80-5856

RECEIVED
DEC 8 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Daniel Joseph Baker, who is now being held in the Gwinnett County, Georgia, Jail, 872 Hi-Hope Road, Lawrenceville, Georgia 30245, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia without pre-payment costs and to proceed in forma pauperis pursuant to Rule 53 of this Court.

Petitioner's affidavit in support of this motion is attached hereto. On May 27, 1980, this Court granted a similar motion for leave to proceed in forma pauperis and at the same time vacated petitioner's death sentence and remanded the case to the Georgia Supreme Court.

Respectfully submitted,

John J. Donohue

WILLIAM H. ALLEN
JOHN J. DONOHUE

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

Attorneys for Petitioner

December, 1980

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DANIEL JOSEPH BAKER,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, DANIEL JOSEPH BAKER being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. Yes_____ No X

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Dec 1977
   West Ga General and Pavings.
   500 Dollars month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No X

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No X

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No X

a. If the answer is yes, describe the property and state its approxamate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None X

None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Daniel Joseph Baker

Daniel Joseph Baker

DANIEL JOSEPH BAKER

STATE OF GEORGIA,
COUNTY OF Dawson

SUBSCRIBED AND SWORN TO
before me this the 17th day of October, 1980.

Michelle Madry

My Commission expires:

Notary Public, Georgia State at Large
My Commission Expires June 15, 1983

RECEIVED
DEC 8 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

80-5856

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

WILLIAM H. ALLEN
JOHN J. DONOHUE

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

Attorneys for Petitioner

December, 1980

QUESTIONS PRESENTED

Under Georgia's capital punishment scheme, a jury must find at least one of ten enumerated statutory aggravating circumstances as a prerequisite to returning a sentence of death for a defendant convicted of a capital offense. One aggravating circumstance is that the offense of which the defendant was convicted "was committed while the offender was engaged in the commission of another capital felony . . . ." Ga. Code Ann. § 27-2534.1(b)(2). Another is that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim." Id. § 27-2534.1(b)(7). The questions presented are:

1. Whether, in the light of this Court's decision in Godfrey v. Georgia, 100 S. Ct. 1759 (1980), petitioner's death sentence, based on a finding of the aggravated circumstance described in section (b)(7) of the Georgia statute, is constitutionally defective under the Eighth and Fourteenth Amendments in the absence of any jury instructions explaining the broad and vague terms of the statute so as to channel the sentencer's discretion by "clear and objective standards."

2. Whether, if section (b)(7) was unconstitutionally applied, petitioner's death sentence is invalid even though the jury also found the existence of the aggravating circumstance described in section (b)(2) of the statute and that section may be validly applied in the circumstances of this case.

3. Whether, in reviewing petitioner's death sentence, the Georgia Supreme Court has fulfilled the function indicated by this Court in Gregg v. Georgia, 428 U.S. 153

(1976), to be essential to the constitutionality of the Georgia capital punishment scheme.

4. Whether the imposition of the death penalty based on a finding of the statutory aggravating circumstance that the defendant committed murder while engaged in the commission of another capital felony violates the Eighth and Fourteenth Amendments where the additional felony is armed robbery, which is not a capital offense.

5. Whether the Georgia Supreme Court's reinstatement of petitioner's death penalty without affording him any opportunity to be heard violates the Sixth, Eighth, and Fourteenth Amendments.

TABLE OF CONTENTS

	Page
Questions Presented	1
Opinions Below	1
Jurisdiction	2
Constitutional And Statutory Provisions Involved	2
Statement	3
The Facts	3
Before The Superior Court of Gwinnett County	5
Before The Georgia Supreme Court	7
In This Court	9
The Action By The Georgia Supreme Court On Remand	9
Reasons For Granting The Writ	11
Conclusion	25

TABLE OF AUTHORITIES

Andres v. United States,
333 U.S. 740 (1948)..... 29

Bachellar v. Maryland,
397 U.S. 564 (1970) 24

Brooks v. State,
___ Ga. ___, 271 S.E.2d 173 (1980)..... 10

Chiarella v. United States,
445 U.S. 222 (1980)..... 24

Collins v. State,
No. 33879 (Ga. S.Ct., Sept. 8, 1980)..... 10

Cramer v. United States,
325 U.S. 1 (1945) 24

Davis v. State,
No. 34193 (Ga. S.Ct., Sept. 24, 1980) 10

Eaton v. Tulsa,
415 U.S. 697 (1974) (per curiam)..... 24

Furman v. Georgia,
408 U.S. 238 (1972)..... 15 , 20, 21

Godfrey v. Georgia,
100 S.Ct. 1769 (1980)..... passim

Gregg v. Georgia,
428 U.S. 153 (1976) ..... passim

Gregory v. Chicago,
394 U.S. 111 (1969)..... 24

Hamilton v. State,
___ Ga. ___, 271 S.E.2d 172 (1980)..... 10

Harris v. State,
237 Ga. 718, 230 S.E.2d 1 (1976) 8

Hicks v. Oklahoma,
___ U.S. ___, 100 S.Ct. 227 (1980) 14, 18

Holton v. State,
253 S.E.2d 740 15

Jackson v. Virginia,
99 S.Ct. 2781 (1979) 24

Martin v. Louisiana,
__ U.S. __, No. 79-6341, Nov. 17, 1980 12

NAACP v. Alabama ex rel Flowers,
377 U.S. 288 (1964) 25

NAACP v. Alabama ex rel Patterson,
357 U.S. 449 (1958) 25

Peek v. State,
239 Ga. 422, 238 S.E.2d 12 (1977) 8

Sandstrom v. Montana,
442 U.S. 510 (1979) 24

Spinkellink v. Wainwright,
578 F.2d 582 (5th Cir. 1978) 21

Spraggins v. State,
No. 34289 (Ga. S.Ct., Sept. 24, 1980 10

Staub v. City of Baxley,
355 U.S. 313 (1958) 25

Stromberg v. California,
283 U.S. 359 (1931) 24

Street v. New York,
394 U.S. 576 (1969) 24

Swan v. State,
322 So.2d 485 (Fla. 1975) 20

Terminiello v. Chicago,
337 U.S. 1 (1949) 24

Westbrook v. Balkcom,
___ U.S. ___, No. 79-6704, Nov. 17, 1980 12

Williams v. North Carolina,
317 U.S. 287 (1942)..... 24

Woodson v. North Carolina,
428 U.S. 280 (1976)..... 24

Wright v. Georgia,
373 U.S. 284 (1963)..... 25

Yates v. United States,
354 U.S. 298 (1957)..... 24

CONSTITUTION AND STATUTES:

U.S. Const. Amend. VIII..... passim

U.S. Const. Amend. XIV..... passim

28 U.S.C. § 1257(3)..... 2

Ga. Code Ann. § 26-3102..... 26a

Ga. Code Ann. § 27-2534.1..... passim, 26a

Ga. Code Ann. § 27-2537..... 28a

OTHER AUTHORITIES

Dix, Appellate Review of the Decision
to Impose Death, 68 Geo. L.J. 97 (1979)..... 20

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia in this case.

OPINIONS BELOW

The initial opinion of the Supreme Court of Georgia affirming the petitioner's sentence of death is reported at 243 Ga. 710, 257 S.E.2d 192 and is reproduced as Appendix A. This death sentence was vacated by this Court and the case was remanded to the Georgia Supreme Court for further consideration in the light of Godfrey v. Georgia. (No. 79-5567, Appendix B.) The Georgia Supreme Court subsequently reinstated the death sentence in an opinion, not yet reported, which is reproduced as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Georgia on remand was entered on September 8, 1980. (Appendix C.) On October 10, 1980, Mr. Justice Powell entered an order extending the time for filing this Petition by 30 days or until December 7, 1980. (Appendix D.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the to have the Assistance of Counsel for his defense."

The Eighth Amendment provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides, in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Relevant provisions of the Georgia Code are set forth in Appendix H hereto.

STATEMENT

The jury's decision to sentence the petitioner to death following his conviction of murder was predicated on its findings that two statutory aggravating circumstances were present. One of these, as specified in Section 27-2534.1(b)(7) of the Georgia Code, was that the murder was "outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." (Tr. 309.)1/

On May 27, 1980, this Court vacated the death sentences in this and five other Georgia cases and remanded to the State Supreme Court for further consideration in light of Godfrey v. Georgia. No. 78-6899, 100 S. Ct. 1759. Without permitting counsel for any of these defendants to argue why Godfrey required reversal of the death sentences and without submitting any of the cases to a jury for resentencing, the Georgia Supreme Court simply reinstated all six death sentences.

The Facts

Petitioner, Daniel Joseph Baker, was indicted along with Ricky Lee Massey for the murder and armed robbery of Dennis Beate..bo. Petitioner, a youth of 19, and Massey, 16, were drinking and driving around town on the evening of May 5, 1978, when they picked up Beatenbo, who was hitchhiking. (Tr. 150.) Beatenbo, who had been drinking heavily, was wearing a shirt bearing the letters NORML -- the acronym for the National Organization for the Reform of Marijuana Laws. (Tr. 316.)

The three drove to Beatenbo's parked car, from which they obtained a bottle of liquor, and then drove around while

---

1/ The statute (P. 27a, infra) speaks in the disjunctive of a murder that is "vile, horrible or inhuman," but the issue was put to the jury, and it made its finding as quoted in the text, in the conjunctive.

drinking until they finally ended up on Pirkle Road in Gwinnett County, Georgia, near Norcross. Massey, the driver, began "cutting doughnuts," or making deep tire tracks, with the automobile, and Beatenbo became sick in the back seat of the car. (Tr. 150.) He was vomiting, and the car was stopped to enable him to get out. (Tr. 151.) His illness was apparently attributable to his extreme level of intoxication. The State stipulated that the ethyl alcohol content in the victim's blood was .39 percent (Tr. 107) -- almost four times the blood alcohol level of .10 percent that constitutes legal intoxication. The criminal investigator for the office of the District Attorney (Tr. 109) testified:

> "Q What generally is the reading that you consider drunk?
>
> A It's .10.
>
> Q And if somebody had .39 alcohol would that be considered very drunk?
>
> A I think he would be unconscious.
>
> Q He probably would be passed out would he not?
>
> A Yes." (Tr. 159.)

Petitioner got out of the car and struck Beatenbo in the face with the liquor bottle. In the opinion of the State's medical witness, Dr. Dove, Beatenbo was thereby rendered unconscious. (Tr. 96, 103.) While Beatenbo lay unconscious on the ground, petitioner shot him three times in the chest. Beatenbo died instantaneously, according to Dr. Dove. (Tr. 97.) After he was dead, petitioner fired a fourth shot into his body between the legs. (Tr. 98, 100-01.) Petitioner then took the victim's wallet containing $22 and his watch. (Tr. 151-52)

Petitioner testified during the sentencing phase of the trial that he did not kill the victim for the purpose of robbing him and did not have any intention of harming the victim prior to his sudden violent outburst. (Tr. 249, 251.) Petitioner stated that he had no explanation of why he killed Beatenbo. Petitioner testified that he took the wallet and watch after the victim was dead in order to make the crime appear to be a robbery. (Tr. 257, 265.) Petitioner stated that he knew what he did was wrong and that he asked God to forgive him for it. (Tr. 253.)

Before The Superior Court of Gwinnett County

Petitioner was convicted of murder and armed robbery after a brief trial. Following the Georgia procedure, the same jury then sat to determine whether to recommend the death penalty. During this phase of the trial, petitioner introduced evidence that, in the words of the Georgia Supreme Court, depicted a rather harrowing history of child abuse." (P. 2a, infra.)2/

2/ Petitioner is illegitimate. (Tr. 207.) When he was 4 or 5, his mother shot and wounded herself in his presence and said she would have killed him if she had had another bullet. (Tr. 208.) In the years petitioner and his sister lived with their mother, there were beatings, mistreatment, and an utter lack of affection. (Tr. 208, 237-38.) When later they lived with their father, he tried to kill them. (Tr. 209.) Relatives who briefly acted as step-parents were no better. Petitioner was made to stay in a small, unlighted, windowless room for as long as a week at a time, even after a wild animal invaded it and had to be shot to save petitioner's life. (Tr. 210-14, 239-40.) At age 8, petitioner was adopted, but his adoptive father was an alcoholic who constantly beat and otherwise mistreated petitioner and was heard by petitioner often to say that he had not wanted him adopted. (Tr. 221-22, 242-43.) After leaving the Marine Corps (which he joined as an alternative to being prosecuted on the complaint of his adoptive father in a dispute over the ownership of an automobile) petitioner met a girl, fell in love, and made plans to marry. (Tr. 245-48.) That affair ended tragically. The girl was accidentally shot and killed. (Tr. 225, 248.) Petitioner took to drink and was drinking heavily at the time of the Beatenbo murder a few months later. (Tr. 225, 248-49.)

The State asked for the death penalty on the basis of two aggravating circumstances specified in the Georgia statute: (1) the murder was committed while the petitioner was engaged in the commission of an additional capital felony, the armed robbery of the victim, and (2) the murder was outrageously or wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the petitioner. Petitioner moved to strike both of these statutory aggravating circumstances. Counsel argued that the first statutory aggravating circumstance must be struck because armed robbery was not a capital felony and that, accordingly, a jury recommendation of the death sentence could not constitutionally be based upon a finding that the murder was committed while the petitioner was engaged in committing an armed robbery. (Tr. 204-05.)

Petitioner moved to strike the other, catchall, aggravating circumstance on two grounds. Petitioner argued in a written motion generally that the catchall aggravating circumstance in its broad and vague phrasing "is unconstitutional and in violation of the Fourteenth Amendment of the United States Constitution." Counsel asserted also that there was no evidence of torture within the meaning of the statute. (Tr. 203-05.) He urged that, if the evidence adduced in the guilt or innocence phase of the trial were sufficient to support a finding of torture to the victim, then the death penalty would be appropriate for any murder, in violation of the teachings of Furman v. Georgia, 408 U.S. 238 (1972).

The trial court denied the motions to strike and submitted both statutory aggravating circumstances to the jury but without any instructions that went beyond the statutory terms. (Tr. 303-4.) The jury returned a recommendation of death, stating that: (1) "the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the

victim or depravity of mind on the part of the defendant," and (2) "The offense of murder was committed while the offender to incident the armed robbery of Dennis Beatenbo." (Tr. 309.) Owing to the garbled finding of the section (b)(2) capital felony provision, the trial court inquired:

> "THE COURT: I will ask you Mr. Foreman, did you intend to state in your writing the offense of murder was committed while the offender was engaged in the commission of an additional felony, to-wit: the armed robbery?
>
> MR. FOREMAN: Yes sir.
>
> THE COURT: I believe I am going to let you correct that so that it will include the entire language of the -- I think you intended to do so, but I believe you have omitted a sentence in it, you may do it there in your jury box if you see fit." (Tr. 309-10.)

Apparently, the jury foreman then changed the language of the jury finding to conform to the instructions of the judge. The jury was not polled to ensure that the entire panel accepted this unusual modification.

Before The Georgia Supreme Court

On appeal to the Georgia Supreme Court, it was argued again that neither statutory aggravating circumstance could constitutionally support the imposition of the death sentence. The Georgia Supreme Court sustained the petitioner's sentence of death in the face of these arguments but without seriously addressing them.

The Georgia Supreme Court characterized petitioner's constitutional claims as follows: "The appellant argues that [the catchall] statutory aggravating circumstance could not support imposition of the death penalty in this case, since there was no evidence of torture or an aggravated battery to the victim, and since the phrase 'depravity of mind' is unconstitutionally vague." The Georgia court dismissed

this argument, citing Gregg v. Georgia, 428 U.S. 153 (1976), and one of its own earlier decisions, Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933 (1977), where, it said, the argument that section 27-2534.1(b)(7) "is unconstitutionally vague was rejected . . . ." (P. 3a, infra.)

Under the sentence review heading of its opinion, the court asserted that "the jury found that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," and it stated a conclusion "that the evidence supports the jury's finding . . . ." (P. 3a, infra; emphasis added.) In fact, the question whether there was an aggravated battery of the victim was not submitted to the jury, and it made no finding that there was such a battery.

The court also stated that the jury found that the murder "was committed while the defendant was engaged in the commission of another capital felony, to wit, armed robbery." (P. 3a, infra.) In fact, to the extent that the jury made any intelligible finding at all on this point, its finding did not use the adjective "capital" in describing the felony of armed robbery. (P. 7, supra.) In response to the contention that it was unconstitutional to use armed robbery as "another capital felony" for purposes of the aggravating circumstance described in Section 27-2534.1(b)(2), the court said merely that it had already been decided in Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), "that those crimes which were capital felonies in Georgia" when the code section was enacted "continue to be 'capital felonies' within the meaning" of the section. (P. 2a, infra.)

In This Court

Last Term, petitioner sought review of the Georgia Supreme Court decision. (No. 79-5567.) Petitioner attacked the constitutionality of both statutory aggravating circumstances as applied to his case and the Georgia Supreme Court's error of affirming the applicability of the section (b)(7) circumstance based on its mistaken notion that the jury had found the existence of an aggravated battery. Petitioner argued, as in Godfrey v. Georgia, 100 S. Ct. 1769 (1980), that the Georgia Supreme Court had adopted an unconstitutionally broad and vague interpretation of the catchall aggravating circumstance in affirming his death penalty. One week after this Court reversed Godfrey's death sentence, it vacated petitioner's sentence of death and remanded his case to the Georgia Supreme Court for further consideration in the light of Godfrey.

The Action By The Georgia Supreme Court On Remand

Following this Court's remand on May 27, 1980, petitioner filed on June 16, 1980, a timely motion for additional additional briefing and oral argument, with an accompanying memorandum. (Appendix E.) Petitioner asked for the opportunity to demonstrate that Godfrey required reversal of petitioner's death sentence because the finding of the catchall aggravating circumstance was constitutionally defective. Petitioner also urged that the defect in the section (b)(7) aggravating circumstance necessarily invalidated petitioner's death sentence, regardless of anything else, and that, in any event, the finding of the section (b)(2) aggravating circumstance was also constitutionally flawed.

On July 15, the Georgia Supreme Court summarily denied petitioner's motion (Appendix F.)

On September 8, 1980, the Georgia Supreme Court reinstated petitioner's death sentence. (Appendix C.) In its opinion, which reaffirmed the initial sentence, it said that the decision in Godfrey was limited "to the specific factual circumstances present in that case." (P. 6a, infra.) The Georgia court restricted its reconsideration to distinguishing those specific circumstances from the facts in this case. In what has already become its standard device of avoiding the effect of Godfrey,[3/] the Georgia court declared that

> "The evidence in this case shows that, unlike Godfrey, the victim was not killed instantaneously, he was not a member of the appellant's family, nor was he threatening the appellant in any manner." (P. 7a, infra.)

The court did not consider any of the mitigating factors that were present in this case but not in Godfrey, nor did it mention any of the aggravating factors that were present in Godfrey -- e.g., that Godfrey killed two persons -- but not in this case. The court stated:

3/ The Georgia Supreme Court employed similar language in the five other cases remanded to it in the wake of Godfrey. See Hamilton v. State, 271 S.E.2d 173 (1980) ("Unlike the murder in Godfrey, death was not instantaneous, the victim was not related to the defendant, and the victim was in no way threatening nor hostile to the defendant."); Brooks v. State, 271 S.E.2d 172 (1980). ("In the present case, the victim died, not instantaneously, but a full two hours after being shot in the neck and abandoned by the appellant."); Collins v. State, No. 33879 (Ga. S. Ct., Sept. 8, 1980)("This court finds material differences . . . which distinguish this murder from the murder in Godfrey . . . the victim was not related to the appellant . . . was not threatening the appellant nor was she causing any emotional trauma to him . . . appellant left the scene and attempted in every manner to avoid prosecution . . ."); Davis v. State and Spraggins v. State, Nos. 34193 and 34289 (Ga. S. Ct., Sept. 24, 1980) ("Unlike the murder in Godfrey, death was not instantaneous, the victim was not related to either defendant, and the victim was in no way threatening nor hostile to the defendants.").

> "The jury returned a finding that, beyond a reasonable doubt, the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant. As we held in our original opinion, its finding is clearly supported by the evidence as set forth above." (Pp. 7a-8a, infra; emphasis added.) 4/

The opinion wholly failed to address the need for jury instructions setting forth a constitutionally acceptable interpretation of the section (b)(7) aggravating circumstance.

REASONS FOR GRANTING THE WRIT

This Court held in Godfrey v. Georgia, 100 S. Ct. 1759 (1980), that the death sentence could not constitutionally be imposed on a defendant who by his own account was guilty of a "hideous crime" on a jury's finding that the murder of which he was convicted was "outrageously or wantonly vile, horrible or inhuman." In the prevailing opinion four Justices said that those epithetical statutory words implied no "inherent restraint on the arbitrary and capricious infliction of the death sentence." 100 S. Ct. at 1765. Furthermore, the jury was given no guidance beyond the statutory words in which it expressed its finding, and the result "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury . . . ." Id. Finally, the plurality opinion indicated that, even if the jury's abbreviation of the statutory description of a category of murders aggravated enough to justify the death penalty were overlooked, the Georgia Supreme Court had not applied in

---

4/ The court overlooked its previous misstatement in its original opinion that the jury had included the existence of aggravated battery in its section (b)(7) finding. (P. 3a, infra.)

Godfrey's case a constitutional construction of the entire statutory phrase "outrageously or wantonly vile, horrible or inhuman in that" the murders involved "depravity of mind." Id. at 1767.

When petitioner's case was first here, the death penalty was vacated and the case was remanded for further consideration in the light of Godfrey. The further consideration was summary and perfunctory. Without receiving briefs or hearing argument, the Georgia Supreme Court woodenly distinguished this case from Godfrey on the facts and reaffirmed the death sentence. (Pp. 7a-8a, infra.)

The principal question posed by the case on its return to this Court is whether, insofar as the same catchall aggravating circumstance was relied upon by the sentencer as the justification for the death penalty, this case can be rationally distinguished from Godfrey. We submit, and argue below (pp. 13-16, infra), that the question must be answered in the negative.

A second question is whether, assuming that a statutory ground of aggravation not present in Godfrey was present here and was validly taken by the Georgia Supreme Court as justification for the death penalty, the death penalty can be sustained even though the sentencer also relied on the catchall Godfrey ground of aggravation. We submit that the negative answer to the question suggested by Mr. Justice Stewart in opinions dissenting from denials of certiorari last month,[5/] is the correct answer. (Pp. 17-18, infra.) At any rate it is a substantial question that the

---

5/ Martin v. Louisiana, 49 U.S.L.W. 3370 (No. 79-6341, Nov. 17, 1980); Westbrook v. Balkcom, 49 U.S.L.W. 3371 (No. 79-6704 Nov. 17, 1980).

Court should undertake to answer after plenary consideration. Issues affecting the imposition of the death penalty should not be left for decision by reference to opinions of individual Justices on certiorari petitions.

Another question whose importance and substantiality are urged here as a reason for granting the writ is whether the review of the death sentence by the Georgia Supreme Court in this case satisfied the constitutional requirements indicated by Gregg v. Georgia, 428 U.S. 153 (1976).[6/] (Pp. 19-25, infra.)

I.

In Godfrey the Court confirmed and underscored lessons that had been taught in Gregg v. Georgia, 428 U.S. 153 (1976), concerning the constitutional responsibilities of a state "that wishes to authorize capital punishment." 100 S. Ct. at 1764. The overarching responsibility is to make and apply a law of capital punishment "that avoids the arbitrary and capricious infliction of the death penalty." Id. To that end a state must define the crimes for which death may be the penalty in a way that avoids standardless sentencing discretion, and it "must channel the sentencer's discretion by 'clear and objective standards' . . . ." Id. at 1764-65.

6/ If certiorari were granted without limitation, petitioner would also argue the issues encompassed by questions presented nos. 4 and 5. (P. ii, supra.) Question 4 -- whether a murder can be constitutionally treated as aggravated because committed while the perpetrator was engaged in the commission of "another capital felony" when the other felony is one for which the death penalty cannot be imposed -- is discussed at pp. 19-22 of petitioner's original petition for certiorari (No. 79-5567). The fifth question, the constitutionality of the Georgia Supreme Court's not receiving written or oral presentations on behalf of petitioner before reimposing the death penalty on remand, is dealt with in other post-Godfrey petitions (Nos. 80-5672, 80-5674).

In Godfrey the Court held that Georgia had failed in its constitutional responsibilities because the statutory terms in which the jury -- the sentencer in Georgia -- was asked to express itself and did express itself imposed no restraint on the jurors' sentencing discretion; and, if the vagueness -- the near emptiness -- of the statutory phrases could be overcome by more specific, enlightening instructions, no such instructions were given. The "instructions gave the jury no guidance concerning the meaning of any of "§ (b)(7)'s terms." Id. at 1765.

This case, even after the remand for further consideration, is not different. The statutory provision is the same as in Godfrey, and, as in Godfrey, the trial court gave the jury not the slightet hint as to the meaning of any of its terms. The "basically uninstructed jury," id., found that "the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant."

That the first clause of the jury's finding taken from section (b)(7) -- "the offense of murder was outrageously or wantonly vile, horrible or inhuman" -- does not, "standing alone, . . . impl[y] any inherent restraint on the arbitrary and capricious infliction of the death sentence" is established by Godfrey. 100 S. Ct. at 1765. And here, as in Godfrey, those words did stand alone, not explained to the jury. The second portion of the jury's finding in this case -- "in that it involved torture or depravity of mind on the part of the defendant" -- does not overcome the constitutional deficiency of the first clause. The jury was authorized to impose the death penalty if it found either torture or depravity of mind. Neither term was explained. As will be

discussed (pp. 22-24, infra), there was in fact no substantial evidence of torture.

The Georgia Supreme Court itself has ruled that

> "It is unlikely that a statutory aggravating circumstance which consisted solely that the murder involved depravity of mind would survive constitutional challenge based on Furman v. Georgia, 408 U.S. 238 . . . (1972); i.e., such an aggravating circumstance could be so broad as to allow the death penalty to be imposed at random in any murder case." Holton v. State, 243 Ga. 312, 318, 253 S.E. 2d 736, 740 (1979).

Even without regard to the lack of substantial evidence of torture, the jury here was given petitioner's case in terms "so broad as to allow the death penalty to be imposed at random in any murder case." Id. The jury was asked to determine whether a murder merited the death penalty because it was outrageously and wantonly vile, horrible, and inhuman -- terms whose breadth and vagueness are, in the expressed judgment of this Court, constitutionally insufficient guides to the exercise of jury discretion in death penalty cases. In addition, these broad and vague terms, followed as they were by an "in that" clause phrased in the disjunctive, were qualified as a matter of logical necessity only by the further unexplicated epithet "depravity of mind," which the court below believes, and this Court apparently agrees, see 100 S. Ct. at 1767, is itself so broad as to invite unconstitutional random imposition of the death sentence.

Given the basis of the Court's decision in Godfrey as it was explained in the prevailing opinion, the Georgia Supreme Court did not begin to distinguish Godfrey. All that it did by way of attempted distinction was to seize on some of the plurality opinion's language descriptive of the Godfrey crime and note that the factors here were not quite

the same. This Court mentioned, for example, that Godrey's victims "were members of his family who were causing him extreme emotional trauma." Id. The Georgia Supreme Court in response solemnly recited that petitioner's victim "was not a member of [his] family . . . ." (P. 7a, supra.)

Yet this limited focus on the facts of this case for comparison with the facts of Godfrey fails to address the fundamental constitutional flaw in Godfrey. As Mr. Justice Marshall put it in his concurring opinion, explaining his and Mr. Justice Brennan's agreement "with the plurality that, as applied in this case, § (b)(7) is unconstitutionally vague":

> "The question is not whether the facts support the jury's finding. As in any case raising issues of vagueness, the question is whether the court below has adopted so ambiguous a construction of the relevant provision that the universe of cases that it comprehends is impermissibly large, thus leaving undue discretion to the decisionmaker and creating intolerable dangers of arbitrariness and caprice." 100 S. Ct. at 1768 n. 1.

II

This case does differ from Godfrey in that there was a second statutory aggravating circumstance put to the jury and made the subject of a finding by it, albeit a garbled finding. (P. 7, supra.) Despite the garble, it may be conceded that the jury found or meant to find that the petitioner committed murder while engaged in an armed robbery. Under the statute an aggravating circumstance is the commission of another capital felony and armed robbery is named as such a felony. Ga. Code Ann. § 27-2534.1(b)(2).

Leaving to one side the constitutional validity of treating armed robbery, no longer a capital felony, as an

aggravating circumstance,[7] it is not at all clear that the Georgia Supreme Court thought that petitioner's death sentence could be sustained solely on the ground of the armed robbery finding.[8]

But even if the Georgia Supreme Court, though not saying so explicitly, meant to rely on the other capital felony aggravating circumstance, the matter is far from concluded. The question remains whether the death penalty can constitutionally be imposed when the sentencer invokes indiscriminately two grounds for its imposition and one is invalid. The substantiality of the question is indicated by, if nothing else, the differing views expressed by Justices in passing on post-Godfrey certiorari petitions on November 17. 49 U.S.L.W. 3370-71. The logic of the position of Mr. Justice Stewart, one of those who wrote on that occasion, seems to us unassailable. He pointed out that the sentencer "has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case." Only the sentencer, then, can know how its discretion would be affected by the knowledge that

---

7/ Because robbery is no longer a capital offense, we contend separately that it cannot constitutionally count as an aggravating circumstance under the Georgia statute as it now reads. (Question 4, p. ii, supra; see n.6, supra.)

8/ On the remand, the court -- in a footnote -- merely mentioned that the jury found two statutory aggravating circumstances and said that "[u]nder our decisions, the death penalty in this case may be upheld upon § 27-2534.1(b)(2) [the other capital felony provision], which we held in our opinion to have been proven beyond a reasonable doubt." (P. 6a, infra.) To say that something may be upheld under the authorities is surely not the same as to say that it is being upheld. Nor is it to say that, even though the other ground of aggravation were eliminated, the death penalty could still be upheld. In contrast, the court devoted three pages of text to a discussion of the catchall aggravating circumstance, and its ultimate conclusion to reaffirm the death sentence was solely in terms of the catchall circumstance. (P. 8a, infra.)

only one aggravating circumstance and not two were present. To affirm a discretionary decision in the circumstances suggested is to act on sheer speculation.

It is no answer, we respectfully submit, that, as stated by Mr. Justice White in his November 17 opinion, "there is no constitutional right to jury sentencing." (49 U.S.L.W. at 3371.) The Court made that clear last Term in Hicks v. Oklahoma, 100 S. Ct. 2227, 2229 (1980):

> "Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." (Citations omitted.)

Moreover, we do not believe that the Georgia Supreme Court in this case or any of its other post-Godfrey decisions has held that "under Georgia law it has the power to determine whether or not a death sentence should be imposed under these circumstances." 49 U.S.L.W. at 3371. In its opinion here, and so far as we know in all the other cases, the court speaks the language of appellate review of the decision of the body -- the jury -- to which the power of decision has been given. There is no reason not to take the court at its word. On review, an unexplained discretionary decision cannot rationally be sustained if one of the substantial considerations entering into it is held to be an impermissible consideration.

Finally, if this Court agrees that, insofar as the catchall aggravating circumstance is concerned, this case

cannot be rationally distinguished from Godfrey, the least that is called for is vacation of the death sentence and a remand to the Georgia Supreme Court for clarification of whether it would again affirm the death sentence in the knowledge that one ground of aggravation was constitutionally infirm. (See n.8, supra.) When a man's life is at stake, he is surely entitled to an explicit statement of why the supreme penalty is being exacted.

III.

In Gregg v. Georgia, 428 U.S. 153 (1976), the members of the Court who concurred in sustaining Georgia's new death penalty statute laid heavy emphasis on the availability of mandatory appellate review by the Georgia Supreme Court as insurance that, in the words of the prevailing opinion, "the sentence of death in a particular case is not disproportionate." Id. at 198. See also id. at 222-24 (opinion of White, J., joined by Burger, C.J., and Rehnquist, J.).

The appellate review function has been distorted in this case in such a way as to call in question the supposition that underlay the Gregg decision. There has been no real effort to ensure that the death sentence here was not disproportionate. The Georgia Supreme Court further has misused the review process by undertaking to cure defects of vagueness that cannot be cured except by a resubmission to the sentencing authority, the jury, under specific, intelligible instructions.

As we have said, the Georgia court sought mechanically to distinguish this case from Godfrey by drawing literal factual distinctions. (Pp. 15-16, supra.) Having done so, it

went on to say that "[t]his was a cold-blooded, planned, execution-type murder perpetrated for the purpose of robbing the victim." (P. 7a, infra.) In strikingly similar fashion two Justices of this Court had said that Godfrey, "in a cold-blooded executioner's style, murdered his wife and his mother-in-law and, in passing, struck his young daughter on the head with the barrel of his gun." 100 S. Ct. at 1775. A deliberate murderer can fairly be characterized as an "executioner," but the dread phrase does not rationally distinguish one deliberate murder from another -- and under Georgia law not all deliberate murders call for the exaction of the supreme penalty.

As well could the Georgia court have described petitioner's crime in very different terms: After a night of carousing with the victim and a sixteen-year-old friend, petitioner, a seriously intoxicated teenager, with no prior criminal convictions and with a lengthy background as a victim of shocking physical and psychological abuse, (n.2, supra), killed a drunken hitchhiker and subsequently took $22 and a watch from his body in order, by petitioner's account, to make what was otherwise senseless look like a robbery. If these facts were emphasized, petitioner's conduct would remain criminal. But they are facts that bear importantly on sentencing. Account must be taken of them to ensure consistency and proportionality in capital sentencing and to avoid the arbitrariness condemned by Furman v. Georgia, 408 U.S. 238 (1972).[9/] See Dix, Appellate Review of the Decision to Impose Death, 68 Geo. L.J. 97, 107 (1979).

9/ Mitigating considerations such as those recited have been found to outweigh the aggravating circumstances in at least one other quite similar case. In Swan v. State, 322 So.2d 485 (Fla. 1975), the defendant was found guilty of murder

(Footnote continued)

The Georgia Supreme Court on review did not weigh aggravating versus mitigating circumstances. It did not begin to fulfill the function that this Court in Gregg viewed as essential, that of ensuring that the death penalty is not arbitrarily inflicted. Instead, it sought to avoid this Court's decision in Godfrey by literal factual distinctions, as we have just seen, and -- and we shall next discuss -- by construing anew the section (b)(7) aggravating circumstance. That endeavor was futile as a matter of legal doctrine and was unsuccessful in any event.

The court's effort was futile for this reason: The holding of Godfrey is that the standardless and unchanneled imposition of a death sentence pursuant to the exercise of uncontrolled discretion by a basically uninstructed jury violates the Eighth and Fourteenth Amendments. That constitutional defect cannot be cured by any statutory construction on appeal. Mr. Justice Marshall's concurrence in Godfrey made the point unmistakably.

(Footnote continued)

committed during the course of a burglary. The victim, who was savagely beaten to death, was a 49-year-old infirm woman. The trial court found that the crime was "outrageously wicked, vile, atrocious, cruel and heinous" and sentenced the defendant to death. Id. at 489. The Court of Appeals for the Fifth Circuit commented on the action of the Florida Supreme Court on appeal, as follows: "The Florida Supreme Court affirmed the conviction but, noting that the defendant was a nineteen-year-old with no significant history of criminal conduct, as well as the fact that 'there is a specific duty imposed on this Court to consider the record in order to assure that the punishment accorded a criminal will meet the standards prescribed in Furman v. Georgia,' the court reversed the sentence. It found 'that there were insufficient aggravating circumstances to justify the imposition of the death penalty' and imposed a sentence of life imprisonment." Spinkellink v. Wainwright, 578 F.2d 582, 602 n.25 (5th Cir. 1978) (emphasis added). These identical mitigating factors are present and required consideration in this case.

> "Such a defect could not be cured by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law." 100 S. Ct. at 1769.

The court's effort was unsuccessful for these reasons:

The jury, it will be recalled, was asked to decide whether the murder of the hitchhiker Beatenbo "was outrageously, or wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." Without the benefit of any explanations of those terms the jury concluded that the murder was properly so characterized. It was not asked to decide and did not decide that the murder involved an aggravated battery to the victim, which is another statutory basis for concluding that a murder was outrageously or wantonly vile, horrible and inhuman.

Although in its jury instructions the trial court was as silent as to what constituted "torture" as it was on any other aspect of the aggravating circumstance, the prosecutor referred to petitioner's having shot the victim "in the privates" -- after he was dead by the earlier gunshots -- and commented: "If that ain't torture then I don't understand the word torture." (Tr. 276.) In his trial report to the Georgia Supreme Court the trial judge responded affirmatively to the question, "Was the victim physically harmed or tortured?" In response to the follow-up instruction to state the extent of the victim's "harm or torture," the trial judge said, "Defendant fired a shot into the victim's genitals as described in the record." (P. 20a, infra.)

Yet, the Georgia court declared on remand in this case: "Godfrey v. Georgia established that torture occurs when the victim is subject to serious physical abuse before death." (P. 8a, infra, emphasis added.) The uncontradicted testimony of the State's own medical witness was that the shot into the genitals, the fourth shot, was fired after the victim's death. Moreover, torture implies the existence of extreme physical pain. It can occur only if the victim is both alive and conscious. Before any action had been taken by the petitioner against the victim, the latter was virtually unconscious as a result of his ingestion of alcohol. Further, the testimony of the State Medical Examiner indicated that, when the petitioner struck the victim in the face with a liquor bottle, the victim was instantly knocked unconscious. (Tr. 103.) Petitioner's testimony on cross-examination was that the initial blow rendered the victim unconscious:

> "Q: Now, when you hit him with the bottle you knocked him out didn't you, he was laying on the ground?
>
> A: I believe so, yes, sir." (Tr. 261.)

There is no substantial evidence that would suggest that the victim suffered the prolonged agony that is the sine qua non of torture.

Nonetheless, the Georgia Supreme Court thought to find support for a finding of torture where neither the prosecutor, nor the trial judge nor, apparently, the jury had looked. Its source was a single remark -- that the petitioner heard the victim moaning -- taken from a confused and inaccurate statement that police officers composed after discussions with petitioner. (Tr. 119-123.) While this

scintilla of evidence is technically relevant, it certainly could not support a death sentence. As this Court said in Jackson v. Virginia, 99 S. Ct. 2781, 2790 (1979):

> "Any evidence that is relevant -- that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401 -- could be deemed a 'mere modicum.' But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt."

Thus, the circumstances of this case reveal that there was no fair evidentiary support for a finding of torture. The requirement of fair evidentiary support for factual determinations must be scrupulously observed in death penalty cases, where the Court has insisted that all "doubts . . . should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948). See also Woodson v. North Carolina, 428 U.S. at 305.[10]/

The Georgia Supreme Court took a second tack in attempting to sustain the application of the catchall aggravating circumstance here. It said: "A defendant who mutilates

---

10/ As noted above, the jury's finding of section (b)(7) in this case was made in the disjunctive, based on either torture or depravity of mind. It is well-established that, if either one of these elements is constitutionally defective, the finding of section (b)(7) cannot be upheld. Stromberg v. California, 283 U.S. 359, 368 (1931); Williams v. North Carolina, 317 U.S. 287, 291-93 (1942); Cramer v. United States, 325 U.S. 1, 36 n.45 (1945); Terminiello v. Chicago, 337 U.S. 1, 5-6 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Gregory v. Chicago, 394 U.S. 111, 113 (1969); Street v. New York, 394 U.S. 576, 586-87 (1969); Bachellar v. Maryland, 397 U.S. 564, 569-71 (1970); Eaton v. Tulsa, 415 U.S. 697, 698-99 (1974) (per curiam); Sandstrom v. Montana, 442 U.S. 510, 526 (1979); Chiarella v. United States, 445 U.S. 222, 237 n.21 (1980). This due process right applies a fortiori in this case because of the greater "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

or seriously disfigures the victim's body after death . . . may be found to have a depraved mind." (P. 8a, infra.) The Court's previous interpretation of this section (b)(7) phrase was that "'depravity of mind' comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim." Godfrey, 100 S. Ct. at 1776 (emphasis added). The departure by the Georgia court from its earlier "consistent conclusions respecting the § (b)(7) aggravating circumstance," id., violates the settled rule that state courts may not juggle their laws in an unpredictable and inconsistent fashion to the prejudice of federal constitutional rights. NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 293-301 (1964); Wright v. Georgia, 373 U.S. 284, 289-91 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 454-58 (1958); Staub v. City of Baxley, 355 U.S. 313, 320 (1958).

CONCLUSION

On any view of the matter, serious questions are presented concerning the constitutionality of the imposition of the death penalty on petitioner. His petition should be granted.

Respectfully submitted,

John J. Donohue III

WILLIAM H. ALLEN
JOHN J. DONOHUE

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

December, 1980

APPENDIX A

BAKER

v.

The STATE.

No. 34588.

Supreme Court of Georgia.

Argued March 13, 1979.

Decided May 31, 1979.

Defendant was convicted in the Gwinett Superior Court, Pittard, J., of murder and armed robbery. His case came before the Supreme Court on direct appeal and for mandatory review of the death sentence imposed. The Supreme Court, Marshall, J., held that: (1) those crimes which were capital felonies in the State when death penalty statute was enacted, including armed robbery, continue to be "capital felonies" within meaning of that statute; (2) evidence establishing that homicide victim had been hit with bottle in the face, that three bullets were fired into his chest at point-blank range and that fourth was fired between his legs after he and died supported jury's finding of statutory aggravating circumstances, i. e., that offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim; and (3) the death sentence was not excessive or disproportionate to the penalty imposed upon defendant's accomplice, or to the penalty imposed in other cases.

Affirmed.

1. Criminal Law ⇐1208(6)

Robbery ⇐30

Those crimes which were capital felonies in the State when death penalty statute was enacted, including armed robbery, continue to be "capital felonies" within meaning of that statute. Code, § 27-2534.1(b)(2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐1208(1)

Statute authorizing imposition of death penalty where offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim is not unconstitutionally vague. Code, § 27-2534.1(b)(7).

3. Homicide ⇐354

Evidence establishing that homicide victim had been hit with bottle in face, that three bullets were fired into his chest at point-blank range and that fourth was fired between his legs after he had died supported jury's finding of statutory aggravating circumstances, i. e., that offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim. Code, § 27-2534.1(b)(2, 7).

4. Homicide ⇐354

In view of fact that defendant was actual perpetrator of murder and armed robbery, of fact that State did not seek death penalty in codefendant's case and of fact that codefendant was more youthful offender that defendant, defendant's sentence to death was not excessive or disproportionate to penalty imposed upon his accomplice, nor was defendant's death sentence excessive or disproportionate to penalty imposed in similar cases considering both crime and defendant. Code, § 27-2534.1(b)(2, 7).

Wynn Pelham, Lawrenceville, for appellant.

Bryant Huff, Dist. Atty., Arthur K. Bolton, Atty. Gen., Nicholas G. Dumich, Sp. Asst. Atty. Gen., for appellee.

MARSHALL, Justice.

The appellant was convicted of murder and armed robbery. He received a death

sentence for the murder conviction and a sentence of life imprisonment for the armed robbery conviction. His case is here on direct appeal and for mandatory review of the death sentence imposed.

I. Summary of the Evidence.

The evidence authorized the jury in finding the following:

On the evening of May 5, 1978, the victim, Dennis Beatenbo, was drinking at a Holiday Inn adjacent to Interstate 85 in Norcross, Georgia. On this same evening, the appellant and Ricky Massey were drinking and driving in the Norcross-Doraville area. At approximately midnight, the victim left the Holiday Inn to go to his car, which was parked nearby at his place of employment. The appellant and Massey passed Beatenbo en route to his car, and they stopped and offered him a ride. In exchange for the ride, Beatenbo offered the appellant and Massey some liquor which he had in his car. In a confession later given by the appellant to police, he stated that when Beatenbo got out of the car to get the liquor, Massey suggested that they "roll him." The three men began riding around together and drinking, and they drove to an isolated spot near a lake. Beatenbo began to get sick and Massey opened the car door so Beatenbo could get out.

In his confession to police, the appellant stated that as Beatenbo was lying on the back seat with his head hanging down, the appellant hit him over the head with a liquor bottle; that Beatenbo fell out of the car; and that the appellant then took his watch and wallet. As stated by the appellant, "I reached in my belt with my right hand and pulled out my pistol and the guy was still laying [sic] on his back. I pointed the gun at the man and I pulled the trigger, I don't know how many times I shot him, but I could hear him moaning and trying to say something."

Medical testimony established the cause of death as a gunshot wound to the chest. It was also established that the victim had been hit with the bottle in the face, rather than on the back of his head, and that the victim received a total of four gunshot wounds. Three of the gunshot wounds were fired into the victim's chest at point-blank range, and the fourth gunshot was fired between his legs after he had died. The bullets recovered from the victim's body were shown to have been fired from the appellant's gun.

In mitigation, the appellant introduced evidence depicting a rather harrowing history of child abuse.

II. Enumerations of Error.

There are two enumerations of error in this appeal.

[1] 1. First, the appellant argues that the death penalty can no longer be imposed under Code Ann. § 27-2534.1(b)(2) (Ga.L. 1973, pp. 159, 163) on the ground that the murder was committed while the offender was engaged in the commission of another capital felony, to wit, armed robbery, since armed robbery is no longer a capital felony. *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974).

It has already been decided in *Peek v. State*, 239 Ga. 422, 431, 432, 238 S.E.2d 12 (1977) that those crimes which were capital felonies in Georgia at the time Code Ann. § 27-2534.1(b)(2) was enacted, including armed robbery, continue to be "capital felonies" within the meaning of the statute. This enumeration of error is therefore without merit.

2. In the second enumeration of error, the appellant argues that the trial court erred in overruling his motion to strike the statutory aggravating circumstance found at Code Ann. § 27-2534.1(b)(7), which authorizes imposition of the death penalty where "[t]he offence of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, a depravity of mind, or an aggravated battery to the victim."

[2] The appellant argues that this statutory aggravating circumstance could not support imposition of the death penalty in this case, since there was no evidence of

torture or an aggravated battery to the victim, and since the phrase "depravity of mind" is unconstitutionally vague. The argument that Code Ann. § 27-2534.1(b)(7) is unconstitutionally vague was rejected by the Supreme Court of the United States in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and by this court in *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976) (cert. den., 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 251 (1977)).

Whether the evidence supports imposition of the death penalty under these two statutory aggravating circumstances, which were found by the jury, will be addressed in the sentence review, infra.

III. Sentence Review.

1. Was the sentence of death imposed under the influence of passion, prejudice, or any other arbitrary factor? We conclude that it was not.

[3] 2. Does the evidence support the jury's finding of statutory aggravating circumstances?

In this case, the jury found that the offense of murder was committed while the defendant was engaged in the commission of another capital felony, to wit, armed robbery. Code Ann. § 27-2534.1(b)(2). In addition, the jury found that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7).

We conclude that the evidence supports the jury's finding of these statutory aggravating circumstances.

[4] 3. Is the sentence of death excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant?

The appellant's accomplice, Ricky Massey, was also tried for murder and armed robbery; and Massey was sentenced to life imprisonment. See *Massey v. State*, 243 Ga. 225, 253 S.E.2d 196. The initial question presenting itself is whether the appellant's death sentence is disproportionate to the penalty imposed in *Massey's* case. We find relevant distinctions between *Massey's* case and Baker's case, which warrant imposing the severer sanction in this case and not in *Massey's*. First, it is undisputed that the appellant was the actual perpetrator of the murder and armed robbery; whereas, the proof of Massey's participation in the murder and armed robbery is not so unequivocal. Second, the state did not seek the death penalty in Massey's case. Third, Massey is a more youthful offender than the appellant. Massey was 16 years of age at the time the crimes were committed.

In sum, we find that the appellant's sentence to death is not excessive or disproportionate to the penalty imposed in the case of his accomplice, Ricky Massey. In determining whether the appellant's death sentence is excessive or disproportionate to the penalty imposed in other similar cases, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find that those similar cases set forth in the appendix support affirmance of the death penalty. Daniel Bak[illegible]r's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant; the verdict is factually supported.

We have reviewed the instructions given by the trial judge during the sentencing phase and find that they are not subject to the defects dealt with in our decisions in *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977) and *Hawes v. State*, 240 Ga. 327(9), 240 S.E.2d 833 (1977).

Judgment affirmed.

All the Justices concur.

APPENDIX

Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 820 (1974); *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 903 (1975); *Berryhill v. State*, 235 Ga. 549, 221 S.E.2d 185 (1975); *Smith v. State*, 236 Ga. 12, 222

APPENDIX—Continued

S.E.2d 308 (1976); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Young v. State*, 237 Ga. 852, 230 S.E.2d 287 (1976); *Douthit v. State*, 239 Ga. 81, 235 S.E.2d 493 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 691 (1977); *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977); *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977); *Thomas v. State*, 240 Ga. 393, 242 S.E.2d 1 (1977); *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642 (1978); *Redd v. State*, 242 Ga. 876, 252 S.E.2d 383 (1979).

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

May 27, 1980

William H. Allen, Esq.
Covington & Burling
888 - 16th St., N.W.
Washington, DC 20006

RE: Daniel Joseph Baker
v. Georgia
No. 79-5567

Dear Mr. Allen:

The Court today entered the following order in the above-entitled case:

"The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari is granted. The judgment is vacated insofar as it leaves undisturbed the death penalty imposed and the case is remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S.___(1980)."

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Francis J. Lorson

Francis J. Lorson
Deputy Clerk

APPENDIX C

524

In the Supreme Court of Georgia

Decided: SEP 8 1980

34588. BAKER v. THE STATE.

ADDENDUM TO 243 Ga. 710.

By order of the Supreme Court of the United States, this case has, as to sentence only, been vacated and remanded for further consideration by this court in light of Godfrey v. Georgia, 446 U.S. (SC , LE2d) (1980); Baker v. Georgia, U.S. (SC , LE2d) (1980) (No. 79-5567; decided May 27, 1980). Our opinion in this case is reported at 243 Ga. 710 (257 SE2d 192) (1979).

In Godfrey v. Georgia, supra, the Supreme Court of the United States held that Ga. Code Ann. § 27-2534.1(b)(7) was unconstitutionally applied as to the specific factual circumstance present in that case. Code Ann. § 27-2534.1(b)(7) provides in part: "The offense of murder ... was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

The appellant's sentence of death in this case rests partially upon Code Ann. § 27-2534.1(b)(7).[1]

1. The jury found two statutory aggravating circumstances: Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). Under our decisions, the death penalty in this case may be upheld upon § 27-2534.1(b)(2), which we held in our opinion to have been proven beyond a reasonable doubt. See the addendum to Dampier v. State, 245 Ga. 427 (SE2d) (1980) at 245 Ga. 882 (1980), wherein we reviewed a sentence of death in light of Godfrey v. Georgia, supra. Gates v. State, 244 Ga. 587, 599 (8) (261 SE2d 349) (1979).

As mandated, we have reviewed the sentence in this case and this court finds material differences between Godfrey and the case under review, which distinguish this murder from the murder in Godfrey and from other "ordinary" murders for which the death penalty is not appropriate.

The evidence in this case shows that, unlike Godfrey, the victim was not killed instantaneously, he was not a member of the appellant's family, nor was he threatening the appellant in any manner. This was a cold-blooded, planned, execution-type murder perpetrated for the purpose of robbing the victim. The appellant lured his victim into his car and, when his victim was helplessly sick from overintoxication, he struck him in the face with a whiskey bottle with such force that the bottle was broken. The blow produced extensive crushing of the face and nose of the victim. Thereafter, the appellant shot the victim three times in the chest. The barrel of the pistol was placed directly on the chest of the victim as the weapon was fired. After the victim was dead, the appellant shot him in the scrotum.

The appellant stated that he could hear the victim moaning and attempting to say something as he continued to shoot him.

The jury returned a finding that, beyond a reasonable doubt, the offense of murder was outrageously and wantonly vile,

horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant. As we held in our original opinion, this finding is clearly supported by the evidence as set forth above. Godfrey v. Georgia established that torture occurs when the victim is subjected to serious physical abuse before death. Hance v. State, 245 Ga. 856 (SE2d)(1980). A defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind.

A defendant who mutilates or seriously disfigures the victim's body after death (Cf. Code Ann. § 26-1305) may be found to have a depraved mind.

Under the facts of this case, we find that the murder was of a type universally condemned by civilized society as wantonly vile, horrible or inhuman, as it involved depravity of mind of the defendant and torture to the victim, as set forth above.

Judgment of affirmance of the death penalty adhered to. All the Justices concur.

APPENDIX D

Supreme Court of the United States

No. A-314

DANIEL JOSEPH BAKER,

Petitioner,

v.

GEORGIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Dec. 7, 1980.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 10th day of October, 1980.

IN THE
SUPREME COURT OF GEORGIA

DANIEL JOSEPH BAKER,	*	CASE NO. 34588
	*	
Appellant,	*	ON APPEAL FROM THE SUPERIOR COURT OF GWINNETT COUNTY
	*	
v.	*	
	*	
THE STATE OF GEORGIA,	*	MURDER; ARMED ROBBERY
	*	
Appellee.	*	

MOTION FOR ADDITIONAL BRIEFING AND ORAL ARGUMENT IN LIGHT OF GODFREY v. GEORGIA

Motion is hereby made for the opportunity to file an additional brief and present oral argument in support of a reversal of the death sentence of Daniel Joseph Baker, Appellant.

Such argument is necessitated by the decision of the United States Supreme Court on May 27, 1980, 48 U.S.L.W. 3767, vacating the appellant's death sentence and remanding the case to this Court for further consideration in the light of Godfrey v. Georgia, 446 U.S. ____, 48 U.S.L.W. 4541 (May 19, 1980). Appellant prays that this motion be granted for the reasons set forth in the attached memorandum.

John J. Donohue
WILLIAM H. ALLEN
JOHN J. DONOHUE

Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

June 16, 1980

NO. 34588

IN THE
SUPREME COURT OF GEORGIA

DANIEL JOSEPH BAKER,

Appellant,

v.

THE STATE OF GEORGIA,

Appellee.

ON REMAND FROM THE SUPREME
COURT OF THE UNITED STATES

MEMORANDUM IN SUPPORT OF APPELLANT'S MOTION FOR ADDITIONAL BRIEFING AND ORAL ARGUMENT IN LIGHT OF GODFREY v. GEORGIA

WILLIAM H. ALLEN
JOHN J. DONOHUE

Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20006
(202) 452-6000

Attorneys for Petitioner

June 16, 1980

NO. 34588

IN THE
SUPREME COURT OF GEORGIA

DANIEL JOSEPH BAKER,

Appellant,

v.

THE STATE OF GEORGIA,

Appellee.

ON REMAND FROM THE SUPREME
COURT OF THE UNITED STATES

MEMORANDUM IN SUPPORT OF APPELLANT'S
MOTION FOR ADDITIONAL BRIEFING AND
ORAL ARGUMENT IN LIGHT OF GODFREY v. GEORGIA

On May 27, 1980, the United States Supreme Court vacated the death sentence of the appellant and remanded his case to this Court for further consideration in the light of Godfrey v. Georgia, 446 U.S. ___, 48 U.S.L.W. 4541 (May 19, 1980). Baker v. Georgia, 48 U.S.L.W. 3767 (May 27, 1980). Appellant now requests the right to file a further brief and, if appropriate, reply brief on the merits and to present oral argument to assist this Court in its further deliberations in this case.

The original briefs and argument in this case do not adequately address the constitutional objections to appellant's death sentence. First, the Godfrey decision has clarified the constitutional standards that must be applied in all death cases and particularly in those resting on Georgia's catch-all aggravating circumstance. Appellant

suggested to the United States Supreme Court that his case be held to await the outcome in the Godfrey case. It was so held. That the United States Supreme Court thereafter remanded for this Court's further consideration in the light of Godfrey demonstrates its belief that the determination here may be affected by what was decided there. Further, appellant's argument in the United States Supreme Court that his sentence of death is unconstitutional was in part that this Court's affirmance of the sentence was based on an erroneous understanding of the jury's finding of the (b)(7) catch-all aggravating circumstance. This argument, which, of course, could not have been raised in the initial briefs presented to this Court, may have influenced the decision of the United States Supreme Court to vacate the appellant's death sentence.

In reversing the Georgia Supreme Court's affirmance of Godfrey's sentence of death, the plurality decision in Godfrey noted that:

> "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Supra, 48 U.S.L.W. at 4543.

The first element of a State's constitutional responsibility is "to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" Id. In the case sub judice, the jury's finding that "the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant" is subject to the same constitutional infirmities that led the Supreme Court to overturn the death sentence in Godfrey.

Certainly, the phrase "outrageously or wantonly vile, horrible and inhuman", cannot provide the requisite guidance, for as the Court noted:

> "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" Id. at 4544.

Moreover, the additional language concerning torture or depravity of mind cannot rescue the hopelessly vague preliminary language of the jury's finding in this case.[1/] This Court has recognized the patent inadequacy of the phrase "depravity of mind" as a means of limiting jury discretion. Holton v. State, 243 Ga. 312, 318, 253 S.E. 2d 736, 740 (1979), cert. denied. In addition, there is no evidence that the appellant tortured the victim, who was killed instantaneously while heavily intoxicated and unconscious, and, contrary to the statement by this Court in the affirmance of appellant's death sentence, the jury did not find that an aggravated battery occurred.

Consequently, the Supreme Court's decision in Godfrey reflects that Court's judgment that death sentences

---

1/ The jury's finding in the disjunctive -- "torture or depravity of mind" -- indicates that only one of these terms was necessarily contemplated by the sentencer. Should either branch be declared insufficient to support the weight of the death penalty, then appellant's sentence must be reversed. Certainly, the Constitution will not allow a death sentence to be affirmed on the basis of "sheer speculation" as to what the jury has found. Godfrey, supra, at 4544. Similarly, the jury's finding of the additional element of aggravation that the murder was committed in the course of an armed robbery cannot support the appellant's death sentence. First, as appellant argued to the United States Supreme Court, the submission of this aggravating circumstance was unconstitutional because armed robbery is not the capital felony that it was made out to the jury to be. Second, in any event, the jury recommendation of death or life is discretionary. When the discretion is exercised in favor of death, the sentence cannot be sustained on the speculation that the discretion would have been exercised the same way had one of the two essential props for the death penalty been absent.

resting on a finding of the (b)(7) aggravating circumstance will be held to violate the Eighth and Fourteenth Amendments where the statutory language is construed in an overly broad fashion. Appellant submits that the principles announced in Godfrey similarly apply in this case for as the Supreme Court said in Godfrey "there is no principled way to distinguish this case in which the death penalty was imposed, from the many cases in which it was not." Id. at 4545.

Accordingly, appellant respectfully requests the opportunity to air these arguments fully through briefs on the merits and oral argument before this Court.

Respectfully submitted,

WILLIAM H. ALLEN
JOHN J. DONOHUE

Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

June 16, 1979

APPENDIX F

SUPREME COURT OF GEORGIA

ATLANTA, July 15, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DANIEL JOSEPH BAKER V. THE STATE

Upon consideration of the Motion for Additional Briefing and Oral Argument in Light of Godfrey v. Georgia, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

Report of the Trial Judge APPENDIX G

JAN 12 1978

of the

Superior Court of Gwinnett County, Georgia

CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

The State vs. Daniel Joseph Baker
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

Name Baker (Last) Daniel (First) Joseph (Middle) 2. Date of Birth 5 - 13 - 58 (No. Day Year)

Social Security Number 255 96 8929
Sex M [x] F [ ] 5. Marital Status: Never Married [x] Married [ ] Divorced [ ] Spouse Deceased [ ]

Children
(a) Number of children _____
(b) Ages of children: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)

Father living: Yes [x] No [ ] If deceased, give date of death _____
Mother living: Yes [x] No [ ] If deceased, give date of death _____
Number of children born to parents 2
Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17
(Circle one) [college

Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 100) Medium [x]
(IQ above 100) High [ ]

Psychiatric Evaluation Performed: Yes [x] No [ ]
If performed is defendant:
a. Able to distinguish right from wrong? [x] [ ]
b. Able to adhere to the right? [x] [ ]
c. Able to cooperate intelligently in his own defense? [x] [ ]
If examined, were character or behavior disorders found? Yes [ ] No [ ]
(If answer is yes, please elaborate)

See attached mental health evaluation.

What other pertinent psychiatric [and psychological] information was revealed

Prior work record of defendant:

Type Job	Pay	Dates Held	Reason for Termination
a. TEM - Norcross, Ga.	3.40/hr.	April, 1978	To accept job driving truck
b. Self-employed mechanic		2/1/78-4/78	
c. Ralph Patton	$150.00/wk.	1/1/78-2/1/78	changed residence
d. West Ga. Fence & Paving Co.		6/1/77-1/1/78	changed residence
e. U.S. Marines		8/75-6/1/77	No discharge

*A separate report must be submitted for each defendant sentenced to death.

B. Data Concerning the Trial

Was the case tried with or without jury? With [x] Without [ ]

How did the defendant plead? Guilty [ ] Not guilty [x]

C. Offense Related Data

Capital Offense for Which Penalty Imposed:

a. Treason . . . . . [ ]
b. Murder . . . . . [x]
c. Kidnapping for Ransom . . . . . [ ]
d. Kidnapping where Injury Results . . [ ]
e. Aircraft Hijacking. . . . . [ ]
f. Rape . . . . . [ ]
g. Armed Robbery . . . . . [ ]

Were other offenses tried in the same trial? yes [x] no [ ]

If other offenses were tried in the same trial list those offenses.

a. Armed robbery

b. _____

c. _____

d. _____

If tried with jury, did the jury recommend the death sentence?
Yes [x] No [ ]

Statutory aggravating circumstances found: Yes [x] No [ ]

Which of the following statutory aggravating circumstances were instructed and which were found?

	Instructed	Found
a. (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or (2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.	[ ]	[ ]
b. (1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery or (2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[x]	[x]
c. The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]

	Instructed	Found
d. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e. The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g. The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.	[x]	[x]
h. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i. The offense of murder was committed by a person in, or who has escaped from the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]
j. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.	[ ]	[ ]

List nonstatutory aggravating circumstances indicated by the evidence, if any.

a. _____

b. _____

c. _____

d. _____

Was there evidence of mitigating circumstances? Yes [x] No [ ]

If so, which of the following mitigating circumstances was in evidence?

a. The defendant has no significant history of prior criminal activity.	[x]
b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.	[ ]
c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.	[ ]
d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.	[ ]
e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.	[ ]

f. The defendant acted under duress or under the domination of another person. [ ]

g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]

h. The youth of the defendant at the time of the crime. [x]

i. Other.
Please explain if (i) is checked _____

_____

_____

If tried with a jury, was the jury instructed to consider mitigating circumstances? Yes [x] No [ ]

Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [x]

Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [x] No [ ]

Was the victim related by blood or marriage to defendant? Yes [ ] No [x]

If answer is yes, what was the relationship? _____

_____

_____

Was the victim an employer or employee of defendant?
No [x]
Employer [ ]
Employee [ ]

Was the victim acquainted with the defendant?
No [x]
Casual Acquaintance [ ]
Friend [ ]

Was the victim local resident or transient in the community?
Resident [x]
Transient [ ]

Was the victim the same race as defendant? Yes [x] No [ ]

Was the victim the same sex as the defendant? Yes [x] No [ ]

Was the victim held hostage during the crime?
No [x]
Yes - Less than an hour [ ]
Yes - More than an hour [ ]

Was the victim's reputation in the community:
Good [ ]
Bad [ ]
Unknown [x]

Was the victim physically harmed or tortured? Yes [x] No [ ]
If yes, state extent of harm or torture: _____

Defendant fired a shot into victim's genitals as described

in the record.

_____

_____

What was the age of the victim? 28

If a weapon was used in commission of the crime was it?

No weapon used	[ ]
Poison	[ ]
Motor Vehicle	[ ]
Blunt Instrument	[x]
Sharp Instrument	[ ]
Firearm	[x]
Other _____	[ ]

Does the defendant have a record of prior convictions? Yes [ ] No [x]

If answer is yes, list the offenses, the dates of the offenses and the sentences imposed?

Offense	Date of Offense	Sentence Imposed
a.		
b.		
c.		
d.		

Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [ ] No [x]
However, as the Court recalls the record, defendant had consumed a quantity o
Was the defendant a local resident or transient in the community? alcohol.

Resident [x]
Transient [ ]

D. Representation of Defendant *

Date counsel secured July 14, 1978

How was counsel secured? a. Retained by defendant [x]
b. Appointed by Court [ ]

If counsel was appointed by court was it because
a. Defendant unable to afford counsel? [ ]
b. Defendant refused to secure counsel? [ ]
c. Other (explain) _____

How many years has counsel practiced law? a. 0 to 5 [ ]
b. 5 to 10 [ ]
c. over ten [x]

What is the nature of counsel's practice? a. Mostly civil [ ]
b. General [ ]
c. Mostly criminal [x]

Did the same counsel serve throughout the trial? Yes [x] No [ ]

If not, explain in detail _____

(If more than one counsel served answer the above questions as to each counsel and attach to this report.)

E. General Considerations

Was race raised by the defense as an issue in the trial? Yes [ ] No [x]

Did race otherwise appear as an issue in the trial? Yes [ ] No [x]

What percentage of the population of your county is the same race as the defendant?

a. Under 10% . . . . . [ ]
b. 10 to 25% . . . . . [ ]
c. 25 to 50% . . . . . [ ]
d. 50 to 75% . . . . . [ ]
e. 75 to 90% . . . . . [ ]
f. Over 90% . . . . . [x]

Were members of defendant's race represented on the jury? Yes [x] No [ ]

If not, was there any evidence they were systematically excluded from the jury? Yes [ ] No [ ]

Was the jury instructed to exclude race as an issue? Yes [ ] No [x]

Was there extensive publicity in the community concerning this case? Yes [ ] No [x]

Was the jury instructed to disregard such publicity? Yes [ ] No [ ]

Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? There was none. Yes [ ] No [ ]

Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [x]

If answer is yes, what was that evidence? _____

In your opinion, was the death sentence imposed in this case appropriate? Yes [x] No [ ]

General comments concerning your answer: _____

F. Chronology of Case

		Elapsed Days
Date of Offense	May 5, 1978	
Date of Arrest	May 5, 1978	
Date Trial Began	November 6, 1978	
Date Sentence Imposed	November 8, 1978	

Date post trial motions ruled on _____

Date Trial Judge's Report Completed _____

January 11, 1979

*Date received by Supreme Court _____

*Date sentence review completed _____

*Total elapsed days _____

*To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached ( )
2. He stated he had no objections after conference. (X)
3. He has not responded ( )

January 11, 1979
Date

Judge, Superior Court of

Gwinnett County

CENTRAL STATE HOSPITAL
Milledgeville, Georgia 31062

August 7, 1978

Honorable Charles C. Pittard
Judge, Superior Court
Gwinnett Judicial Circuit
Duluth, Georgia 30136

RE: Baker, Daniel Joseph
Case No: 222,881
Binion 2 South
Gwinnett County

Dear Judge Pittard:

The above named individual was admitted to this hospital on July 24, 1978 by Order of your Court for an examination and evaluation of his mental condition and mental capacity to face charges of Murder.

This patient is not suffering from any serious mental illness or mental defect. His main problems seem to be related to a chronic depression which appears to be related to his early life, according to the information from this patient. He apparently had a traumatic childhood - he was given away and adopted. He had some difficulty with his real parents and not too long ago his girlfriend was killed in an accident. Now his depression seems to be getting worse because of his arrest, incarceration and the possible consequences of the charges pending against him. We feel that he is not suffering from any type of psychosis at the present time. His mental status could be described as follows: alert, cooperative, good reality contact, well oriented to time, place and person, follows rules and regulations and causes no problems. He denies any delusional ideas and also suicidal ideas. We have not seen any aggressive or violent behavior nor any bizarre behavior. He eats and sleeps well and takes his medications. Psychological evaluations indicate that he functions within the normal range of intellectual functioning and there is not mentally retarded.

Physical and neurological examinations were unremarkable. Routine laboratory procedures were within normal limits, including a non-reactive VDRL for syphilis. Electroencephalogram was normal. Skull x-ray showed no pathology and was negative. He is not considered to be suffering from any convulsive disorder or epilepsy. He is in excellent physical health.

He is aware of the charges pending against him and the possible consequences. He is able to assist his attorney in the preparation of his defense. Therefore,

we consider him competent to proceed with his legal situation. Regarding his condition at the time of the alleged offense, we feel that most likely he was not psychotic on that particular date, and therefore, knew the difference between right and wrong. Also, we feel that he was not suffering from any compulsive delusion which overmastered his will to resist committing the act with which he is charged. Regarding any mitigating circumstances, we would like to state that his chronic depression, traumatic early childhood and also the use of excessive amounts of alcohol at times could be considered as mitigating circumstances regarding the alleged offense.

Regarding any recommendations after the disposition of the charges, we would like to state that this patient should continue to have counseling for his depression and also, if possible, that he be involved in some type of vocational rehabilitation program.

We have completed our examination and evaluation and recommend that he be returned into the custody of the court for final disposition of his case.

Please send a duly authorized person for him at your earliest possible convenience.

Very truly yours,

Miguel A. Bosch, M.D., Chief
Forensic Services Division

MAB/jlm

cc: Mr. Dawson Jackson
Mr. Wynn Pelham

This case involves the following provisions of the Georgia Code:

Ga. Code Ann. § 26-3102

"Capital offenses; jury verdict and sentence.

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. § 27-2534.1

"Mitigating and aggravating circumstances; death penalty.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed

while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in change and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond

a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. § 27-2537

"Review of death sentences.

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in tne form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The Court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

NO. 80-5856

RECEIVED
JAN 14 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DANIEL JOSEPH BAKER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

NICHOLAS G. DUMICH
Assistant Attorney General
Counsel of Record for
the Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

NICHOLAS G. DUMICH
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-6344

QUESTIONS PRESENTED

1.

Whether the Supreme Court of Georgia employed the proper procedures on remand from this Court and properly reaffirmed Petitioner's death sentence in light of Godfrey v. Georgia, 446 U.S. ___, 100 S.Ct. 1759 (1980), and Gregg v. Georgia, 428 U.S. 153 (1976).

2.

Whether this Court should consider the question of the trial court's failure to define and explain the terminology expressed in Ga. Code Ann. § 27-2534.1(b)(7), when said issue was not addressed in the lower state courts.

3.

Assuming arguendo this issue is properly before the Court in light of number 2 above, whether or not it was necessary for the trial court to give limiting and explanatory instructions during the punishment phase of Petitioner's trial in regard to Ga. Code Ann. § 27-2534.1(b)(7).

4.

Whether or not the existence of an additional aggravating circumstance would permit Petitioner's death penalty to remain intact, should this Court find that one of the aggravating circumstances has been improperly imposed.

TABLE OF CONTENTS

Page

PART ONE
STATEMENT OF THE CASE 1

PART TWO
STATEMENT OF THE FACTS. 2

PART THREE
REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY REAFFIRMED PETITIONER'S DEATH SENTENCE UNDER GA. CODE ANN. § 27-2534.1(b)(7), IN LIGHT OF GODFREY V. GEORGIA, 446 U.S. ___, 100 S.Ct. 1759 (1980) AND GREGG V. GEORGIA, 428 U.S. 153 (1976) 5

B. PETITIONER DID NOT SPECIFICALLY RAISE IN THE STATE COURTS BELOW, THE QUESTION OF WHETHER THE TRIAL COURT ERRED IN FAILING TO DEFINE AND EXPLAIN THE TERMINOLOGY EXPRESSED IN GA. CODE ANN. § 27-2534.1(b)(7), AND SAID QUESTION SHOULD NOT NOW BE EXAMINED FOR THE FIRST TIME ON THIS PETITION FOR A WRIT OF CERTIORARI. ALTERNATIVELY, THE FAILURE OF THE TRIAL COURT TO EXPLAIN SAID TERMINOLOGY WAS NOT ERROR, AND DID NOT OPERATE TO DEPRIVE THE PETITIONER OF ANY STATUTORY OR CONSTITUTIONAL RIGHTS 9

C. IN ADDITION TO FINDING AN AGGRAVATING CIRCUMSTANCE UNDER GA. CODE ANN. § 27-2534.1 (b)(7), THE JURY ALSO FOUND SUFFICIENT EVIDENCE TO INDEPENDENTLY SUPPORT PETITIONER'S DEATH PENALTY UNDER GA. CODE ANN. § 27-2534.1 (b)(2) 13

CONCLUSION. 16

CERTIFICATE OF SERVICE. 17

TABLE OF AUTHORITIES

Cases Cited:	Page
Baker v. Georgia, ___ U.S. ___, 100 S.Ct. 2936 (1980). . .	1
Baker v. State, 243 Ga. 710, 711, 257 S.E.2d 192 (1979, death sentence vacated and remanded, ___ U.S. ___, 100 S.Ct. 2936 (1980), reaffirmed, 246 Ga. 259, ___ S.E.2d ___ (1980)	1,13
Baker v. State, 246 Ga. 259, ___ S.E.2d ___ (1980)	1
Burger v. State, 245 Ga. 485, 460-61, 265 S.E.2d 797, cert. den., ___ U.S. ___, 100 S.Ct. 2975, rehng. den., ___ U.S. ___, 101 S.Ct. 31 (1980)	14
Cape v. State, 246 Ga. 520, ___ S.E.2d ___ (1980).	8
Cardinale v. Louisiana, 394 U.S. 437 (1969).	10
Dampier v. State, 245 Ga. 882, 883, ___ S.E.2d ___, cert. den., ___ U.S. ___ (Case No. 80-5215, 1980)	14
Davis v. State, 241 Ga. 376, 384, 247 S.E.2d 45 (1978), cert. den., 429 U.S. 122 (1978)	13
Fair v. State, 245 Ga. 868, 880, ___ S.E.2d ___ (1980), cert. den., ___ U.S. ___ (Case No. 79-6884, Nov. 10, 1980)	14
Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), cert. den., ___ U.S. ___, 100 S.Ct. 1332 (1980) . . .	14
Godfrey v. Georgia, 446 U.S. ___, 100 S.Ct. 1759 (1980). .	i,1,passim
Green v. State, 246 Ga. 598, ___ S.E.2d ___ (1980)	8
Gregg v. Georgia, 428 U.S. 153 (1976).	i,5,7,8
Hance v. State, 245 Ga. 856, 862, 268 S.E.2d 339 (1980). .	7,8,11
Harris v. State, 237 Ga. 718, 730, 230 S.E.2d 1 (1976), cert. den., 431 U.S. 933 (1977), rehng. den., 434 U.S. 883 (1977)	11
Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), cert. den., 439 U.S. 882 (1978)	13
Philbrook v. Glodgett, 421 U.S. 707, 713 (1975).	13
Tacon v. Arizona, 410 U.S. 431 (1973).	10
Westbrook v. Balkcom, ___ U.S. ___, 49 U.S.L.W. 3371 (Nov. 17, 1980), (Stevens, J., concurring).	14

Statutes Cited:	Page
28 U.S.C. § 1257	10
Ga. Code Ann. § 27-2534.1(b)(2).	10,13,15,16
Ga. Code Ann. § 27-2534.1(b)(7).	i,5,7,8,9, 10,12,13

PART ONE

STATEMENT OF THE CASE

Petitioner, Daniel Joseph Baker, was indicted along with co-defendant Ricky Lee Massey by the March Term, 1978, Gwinnett County, Georgia Grand Jury for the murder and armed robbery of Dennis Beatenbo. Following a jury trial in which Petitioner was separately tried from his co-defendant, Petitioner was found guilty on both counts and was sentenced to death for the murder conviction and to life imprisonment for the armed robbery.

On his first direct appeal to the Supreme Court of Georgia, Petitioner's convictions and sentences were affirmed. Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (1979). On May 27, 1980, certiorari was granted by this Court, the Georgia Supreme Court's affirmance of Petitioner's death penalty was vacated, and the case was remanded for further review by the Georgia Supreme Court in light of this Court's decision in Godfrey v. Georgia, 446 U.S. ___, 100 S.Ct. 1759 (1980). Baker v. Georgia, ___U.S.___, 100 S.Ct. 2936 (1980).

Upon remand, the Supreme Court of Georgia again reaffirmed Petitioner's death sentence. Baker v. State, Addendum, 246 Ga. 259, ___S.E.2d ___ (1980). Thereafter, Petitioner filed the instant petition for a writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

As noted in the previous section, Petitioner was indicted along with co-defendant Rick Massey for the May 5, 1978, murder and armed robbery of Dennis Beatenbo. The evidence shows that during the evening on the aforesaid date, Petitioner and a friend, Rick Massey, had been drinking while driving around the Norcross, Georgia community area. Seeing Dennis Beatenbo walking along the road, Massey and the Petitioner stopped and asked him if he needed a ride. (T. 149-150). In exchange for this ride Beatenbo offered Petitioner and Massey some liquor which was contained in a bottle in Beatenbo's automobile which was parked elsewhere. (T. 70, 150, 261). In a statement to the police, the Petitioner related that when Beatenbo left Massey's car to retrieve the liquor, Massey suggested that they "roll" him. (T. 150). Beatenbo returned and the three men then went for a drive while continuing to consume the liquor. Eventually they drove to an isolated spot at a nearby lake. (T. 150). Thereafter, Beatenbo began to feel nauseated. While Massey opened the back door so that Beatenbo could get out of the car, the Petitioner placed a newly purchased .25 caliber pistol in his belt. (T. 151).

In his confession to the police, Petitioner related that as Beatenbo was lying on the back seat with his head hanging over, Petitioner then smashed Beatenbo in the head with a liquor bottle, causing the bottle to break. Beatenbo then raised up and fell out of the other side of the car, lying with his back on the ground. (T. 151, 251). The Petitioner then took the

victim's wallet and watch while Massey observed. (T. 151). In Petitioner's own words, "I reached in my belt with my right hand and pulled out my pistol and the guy was still lying on his back. I pointed the gun at the man and pulled the trigger, I don't know how many times I shot him, but I could hear him moaning and trying to say something." (T. 151). The Petitioner and Massey then split the $22.00 found in the victim's wallet, and drove to Petitioner's trailer. (T.152). Beatenbo's body was discovered the next morning. (T. 78).

During the trial, the State M ical Examiner testified that the victim had suffered a crushing blow to his face which broke his nose and damaged his eye and facial tissues. He further testified that the victim had received four gunshot wounds, three of which were the result of the pistol being pressed firmly against the victim's body and fired directly into his chest. Maliciously, one bullet was also fired into the victim's scrotum area; however, Dr. Dove theorized that this shot was fired after the victim had died. (T. 97-102). Another State's witness, Bobby Barnes, testified that on Friday, May 5, 1978, the Petitioner had admitted that he killed a man in a robbery by hitting him in the face with a bottle, then s ting him. (T. 82-83). Barnes also testified that he had seen the Petitioner with a gun at the Petitioner's trailer. (T. 84). After Petitioner's arrest, he informed the police where to find the pistol which was used in the murder, and Massey led the police to Beatenbo's watch which had been thrown away. (T. 132, 162). During the course of Petitioner's questioning by the police, he stated that Massey had never suggested killing Beatenbo, but suggested only that they rob him. It was solely Baker's idea to kill the victim, and when

asked why he had done it he answered, "Just to watch him die." (T. 158, 168).

Petitioner was convicted of the murder and following the punishment phase of the trial, the jury found that the death penalty was justified based on two aggravating circumstances, those being: (1) the murder was committed while the Petitioner was engaged in the armed robbery of the victim; and (2) the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the Petitioner. (T. 309-310).

Additional facts may be recited in the following portion of this Brief when necessary to more fully explain Respondent's argument.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY REAFFIRMED PETITIONER'S DEATH SENTENCE UNDER GA. CODE ANN. § 27-2534.1(b)(7), IN LIGHT OF GODFREY V. GEORGIA, 446 U.S. ___, 100 S.Ct. 1759 (1980) AND GREGG V. GEORGIA, 428 U.S. 153 (1976).

Petitioner asserts that this Court should grant certiorari to consider whether the Georgia Supreme Court construed or applied Ga. Code Ann. § 27-2534.1(b)(7) in an unconstitutional manner. He attempts to discredit the opinion of the Georgia Supreme Court on remand, by asserting that the Court merely found insignificant factual differences which allegedly failed to distinguish this case from the facts in Godfrey v. Georgia, 446 U.S. ___, 100 S.Ct. 1759 (1980). Petitioner further argues that under the facts and circumstances of this case, the evidence was insufficient to support the jury's finding of a (b)(7) aggravating circumstance, or the Georgia Supreme Court's affirmation and reaffirmation of same.

Godfrey v. Georgia, supra, specifically dealt with the application of Ga. Code Ann. § 27-2534.1(b)(7) in that case. The jury in Godfrey recommended a death sentence based upon a partial finding under (b)(7) that the murder of the victim had been "outrageously or wantonly vile, horrible and inhuman." This Court held that there was nothing in these few words, standing alone, that implied any inherent restraint upon the arbitrary and capricious infliction of the death sentence. Godfrey, Id., at p. 1765.

In the instant case, however, relating to the (b)(7) aggravating circumstance, the jury found that the murder was, "outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." As opposed to Godfrey, the wording of the jury's finding in this case is sufficiently definite to insure against any arbitrary or capricious infliction of the death sentence, and the record as reviewed by the Georgia Supreme Court, revealed sufficient evidence to support the jury's finding that the victim suffered from torture,and that the Petitioner had demonstrated his depravity of mind beyond all reasonable doubt.

In the Appellant's confession to the police he related how he had smashed a whiskey bottle over the head of Dennis Beatenbo. He further admitted to the police, "I reached in my belt with my right hand and pulled out my pistol and the guy was still lying on his back. I pointed the gun at the man and I pulled the trigger. I don't know how many times I shot him, but I could hear him moaning and trying to say something. . ." (T. 151).

The testimony at trial established that the victim had suffered a crushing blow to the face which had broken his nose and had extensively damaged the tissue around both eyes. There was also a bruise on the victim's forearm which was classified by the medical examiner as a defensive type wound. (T. 102). Furthermore, Dr. Dove testified that the victim had suffered three separate chest wounds from a gun which had been placed directly against his body and fired. (T. 97). An additional fourth shot was fired into the victim's scrotum area; however, Dr. Dove theorized that this wound was implemented after the victim's death. (T. 98). The aforesaid amply supports the

jury's finding of torture which was notably absent in Godfrey.

Likewise, a finding that the Petitioner exhibited a depravity of mind which would authorize the death penalty in this case, is also demonstrated by the evidence. The facts, as noted under Part Two of this Brief, show a cold-blooded, brutal attack upon the victim and no remorse on the part of the Petitioner. The jury's finding that the Petitioner exhibited depravity of mind can best be supported simply by a review of those facts, and by referring to the statement made by the Petitioner when asked, "Danny why did you kill him?" The Petitioner answered, "Just to watch him die." (T. 168). The Petitioner's mutilation of the body of Dennis Beatenbo after killing him, is also sufficient to show Petitioner's depravity of mind within the meaning of the statute. Hance v. State, 245 Ga. 856, 862, 268 S.E.2d 339 (1980).

In Gregg v. Georgia, 428 U.S. 153, 201 (1976), the plurality opinion addressed the issue of whether Ga. Code Ann. § 27-2534.1 (b)(7) was overly broad and vague. This Court acknowledged that an open-ended construction need not be applied by the Georgia Supreme Court to the language of the statute, and thus, the constitutional validity of that Code Section was upheld. Here, the Georgia Supreme Court engaged in a detailed examination of the facts in this case as applied to the (b)(7) aggravating circumstance found by the jury. In reality, since this court's decision in Godfrey, the Supreme Court of Georgia has taken even greater pains to make its appellate review an elaborate and detailed process to insure against the imposition of a disproportionate or arbitrary death penalty. See, e.g.,

Hance v. State, supra; Cape v. State, 246 Ga. 520, ___S.E.2d ___ (1980); Green v. State, 246 Ga. 598, ___S.E.2d ___ (1980). Thus, the Georgia Supreme Court has met the mandates as set out by this Court in Gregg, supra and Godfrey, supra.

Furthermore, contrary to Petitioner's assertions, there was no requirement that the Georgia Supreme Court allow Petitioner to file briefs or conduct oral argument prior to said court's review of this case following remand from this Court on May 27, 1980. Upon remand, the Georgia Supreme Court merely conducted a portion of its previous appellate review in more detail. The Court did not conduct any sentencing proceeding, but merely reconsidered its own judgment in light of Godfrey. The Georgia Supreme Court, at that time, had before it the complete record of Petitioner's trial, which included all of the information necessary to review the jury's findings on Ga. Code Ann. § 27-2534.1(b)(7). The decision as to whether or not to allow oral argument and additional briefing was within the sound discretion of the Georgia Supreme Court and does not rise to a constitutional violation under the facts of this case.

B. PETITIONER DID NOT SPECIFICALLY RAISE IN THE STATE COURTS BELOW, THE QUESTION OF WHETHER THE TRIAL COURT ERRED IN FAILING TO DEFINE AND EXPLAIN THE TERMINOLOGY EXPRESSED IN GA. CODE ANN. § 27-2534.1(b)(7), AND SAID QUESTION SHOULD NOT NOW BE EXAMINED FOR THE FIRST TIME ON THIS PETITION FOR A WRIT OF CERTIORARI. ALTERNATIVELY, THE FAILURE OF THE TRIAL COURT TO EXPLAIN SAID TERMINOLOGY WAS NOT ERROR, AND DID NOT OPERATE TO DEPRIVE THE PETITIONER OF ANY STATUTORY OR CONSTITUTIONAL RIGHTS.

An additional issue raised by the Petitioner in the present case pertained to whether or not Petitioner's death penalty, as authorized under Ga. Code Ann. § 27-2534.1(b)(7) must be vacated, because of the failure of the trial judge to instruct the jury relating to the legal meaning and definition of the terminology under said statute.

Initially, it should be noted that this issue was neither specifically raised nor considered in Petitioner's direct appeal to the Georgia Supreme Court or upon remand following Petitioner's initial application for certiorari. Since said issue was not specifically raised before the Georgia Supreme Court, Respondent respectfully submits that this Court should decline to review this issue for the first time on this writ of certiorari.

The Petitioner's enumerations of error in the Georgia Supreme Court raise three issues:

(1) Whether the jury could have properly found an aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(2) [i.e., the murder was committed while in the commission of another capital felony: to wit, armed robbery] when under Georgia law, the death penalty may no longer be imposed for armed robbery alone?

(2) Whether the term "depravity of mind" is unconstitutionally vague as used in Ga. Code Ann. § 27-2534.1(b)(7)?

(3) Whether or not the jury was authorized to impose the death penalty under Ga. Code Ann. § 27-2534.1(b)(7) when allegedly there was no evidence to support a finding of torture?

This Court has consistently ruled that federal constitutional issues raised for the first time on appeal from a state court decision will not be reviewed. Cardinale v. Louisiana, 394 U.S. 437 (1969); Tacon v. Arizona, 410 U.S. 531 (1973); also see, 28 U.S.C. § 1257. Thus, since the federal question raised relating to the trial court's instructions under (b)(7) has not been reviewed, preserved or specifically passed upon in the state courts below, this Court should decline to accept jurisdiction to review this issue.

Alternatively, Respondent submits that justification for this Court's refusal to grant the writ of certiorari to review Petitioner's above contention may rest upon this Court's finding that the absence of any explanatory or limiting instructions was not error and did not harm the Petitioner under the facts of the instant case.

This is evidenced by the jury's (b)(7) finding that the murder in the instant case was "outrageously vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." (T. 309). In Godfrey, as this Court is well aware, the jury returned only a finding that the murder was outrageously or wantonly vile, horrible and inhuman. Thus, this Court was forced to speculate as to the jury's interpretation of aggravating circumstance (b)(7). Unlike Godfrey, the finding by the jury in this case of torture and depravity of mind leaves no doubt as to the jury's interpretation under the first clause of (b)(7).

Notwithstanding the trial court's failure to expound on the terminology of (b)(7), Petitioner's right to be free from an arbitrary and capricious decision under that Code Section was protected through the appellate review by the Georgia Supreme Court both on the original direct appeal and upon remand from this Court. At the time Petitioner's trial was reviewed on remand by the Georgia Supreme Court, said court had already before it the benefit of this Court's opinion in Godfrey, and had also decided Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), where the Georgia Court engaged in a detailed, thorough discussion of (b)(7) in light of Godfrey. Even prior to Hance, the Georgia Supreme Court had recognized its obligation to insure that it only affirmed those death sentences supported by Code § (b)(7), which are so outrageous and vile so as to lie at the core of the statutory intent. See, Harris v. State, 237 Ga. 718, 730, 230 S.E.2d 1 (1976), cert. den., 431 U.S. 933 (1977), rehng. den., 434 U.S. 882 (1977). Here, since the jury made a sufficiently specific finding regarding the (b)(7) aggravating circumstance, and since the Georgia Supreme

Court adequately performed a thorough review under the facts of this case to insure said findings were thoroughly supported by the record, this Court can determine that the absence of limiting or explanatory instructions relating to the meaning of the individual terms contained in aggravating circumstance (b)(7) did not disadvantage the Petitioner or deprive him of any constitutional or statutory rights.

Moreover, there is no statutory provision under Georgia law which requires that the specific terminology under (b)(7) be explained. The judge in this case did instruct the jury that the death penalty could be imposed if the jury found beyond a reasonable doubt that the offense was committed under statutory aggravating circumstances. (T. 303). The court directed that one of the statutory aggravating circumstances which could authorize the death penalty in this case, was the jury's finding, "that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." (T. 304). The court also instructed that even though statutory aggravating circumstances were found, the jury need not recommend the death penalty, and could recommend a life sentence for any reason, or without any reason. (T. 306). In light of the aforesaid instructions to the jury, and in light of the detailed review by the Georgia Supreme Court which insured said instructions were not applied arbitrarily or capriciously to the facts of this case, it is clear Petitioner has not been harmed by the absence of an explanation to the jury of the individual meaning of the terms in Code § 27-2534.1(b)(7).

C. IN ADDITION TO FINDING AN AGGRAVATING CIRCUMSTANCE UNDER GA. CODE ANN. § 27-2534.1 (b)(7), THE JURY ALSO FOUND SUFFICIENT EVIDENCE TO INDEPENDENTLY SUPPORT PETITIONER'S DEATH PENALTY UNDER GA. CODE ANN. § 27-2534.1 (b)(2).

As noted in Part Two of this Brief, two statutory aggravating circumstances were found to exist by the jury which tried the Petitioner's case. In addition to finding that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant, the jury also found that the murder was committed while the Petitioner had been engaged in the commission of an armed robbery. (T. 309-310; R. 12). The Georgia Supreme Court has consistently held that under Georgia law armed robbery is a capital felony for the purpose of finding aggravating circumstances under Ga. Code Ann. § 27-2534.1(b)(2). Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), cert. den., 439 U.S. 882 (1978); Davis v. State, 241 Ga. 376, 384, 247 S.E.2d 45 (1978), cert. den., 429 U.S. 122 (1978); Baker v. State, 243 Ga. 710, 711, 257 S.E.2d 192 (1979), death sentence vacated and remanded, ___U.S.___, 100 S.Ct. 2936 (1980), reaffirmed, 246 Ga. 259, ___S.E.2d ___ (1980). In holding that armed robbery may be considered a capital felony for the purpose of Code § 27-2534.1(b)(2), the Georgia Supreme Court has correctly applied the basic premise that the objective of a court in construing statutory construction is to ascertain the intent of the legislature and to give effect to that legislative will. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975).

The law in Georgia is also clear that even if the finding of one of the aggravating circumstances must be set aside, the death penalty will still be upheld if another aggravating circumstance exists. Dampier v. State, addendum, 245 Ga. 882, 883, ___S.E.2d___, cert. den., ___U.S.___ (Case No. 80-5215, 1980); Fair v. State, 245 Ga. 868, 880, ___S.E.2d ___ (1980), cert. den., ___U.S.___ (Case No. 79-6884, Nov. 10, 1980); Burger v. State, 245 Ga. 485, 460-61, 265 S.E.2d 797, cert. den., ___U.S.___, 100 S.Ct. 2975, rehng. den., ___U.S. ___, 101 S.Ct. 31 (1980); Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), cert. den., ___U.S.___, 100 S.Ct. 1332 (1980).

Furthermore, in denying certiorari in an additional Georgia death penalty case, Justice Stevens noted:

> "The Georgia Supreme Court . . . decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, will not be set aside simply because one of the aggravating circumstances is vunerable. . .. The Georgia Supreme Court's position is clear, and . . . I consider it consistent with this Court's decisions." Westbrook v. Balkcom, ___U.S. ___, 49 U.S.L.W. 3371 (Nov. 17, 1980), (Stevens, J., concurring).

Respondent submits that the remands which have been issued by this Court do not indicate that a complete reversal of the death sentence is required when one aggravating circumstance is found not to be supported by the evidence. Contrary to Petitioner's assertions, there is no ambiguity as to whether the basis for the death penalty is constitutional. The jury found that there was sufficient evidence to support both aggravating circumstances beyond a reasonable doubt. The elimination of one of the aggravating circumstances on appeal had no effect on the evidence considered by the jury in this case, as the jury is authorized to consider all facts and circumstances presented at trial in mitigation and aggravation. The underlying facts and circumstances which formulated the basis for the death penalty were available for the jury's consideration notwithstanding any later appellate decisions vacating one of the statutory aggravating circumstances. Thus, assuming arguendo that this Court should find the (b)(7) aggravating circumstance to be unconstitutionally imposed in this case, that would simply have no bearing on the jury's imposition of the death penalty under Code § 27-2534.1(b)(2), because the jury still would have had all of the same underlying information before it in aggravation and to further support their (b)(2) finding beyond the statutory requirements for that circumstance.

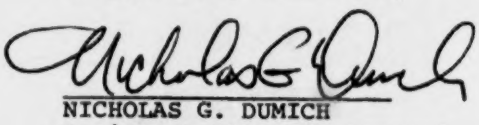
Here, there was overwhelming evidence that the attack upon the victim had been motivated by an intent to "roll him," and that $22.00 and a watch were taken from the victim's body after Petitioner smashed the victim in the face with a whiskey bottle, and immediately before killing him. (T. 150-151, 158). Thus, the Georgia Supreme Court properly affirmed the (b)(2) aggravating circumstance as being supported by the evidence.

In conclusion, Respondent asserts that even if the seventh aggravating circumstance was improperly found in the instant case, the existence of the additional aggravating circumstance under Code § 27-2534.1(b)(2) is sufficient to support the death penalty.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of Petitioner Danny Baker.

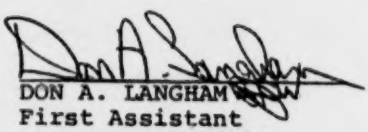
Respectfully submitted,



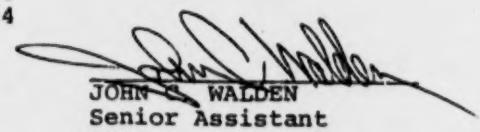
NICHOLAS G. DUMICH
Assistant Attorney General
Attorney of Record for the
Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General



DON A. LANGHAM
First Assistant
Attorney General



JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

NICHOLAS G. DUMICH
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3499

Office-Supreme Court, U.S.
FILED
FEB 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-5856

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of the State of Georgia

REPLY BRIEF FOR PETITIONER

WILLIAM H. ALLEN
JOHN J. DONOHUE

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

Attorneys for Petitioner

February 1981

TABLE OF AUTHORITIES

Cases:	Page
Furman v. Georgia, 408 U.S. 238 (1972)	6
Godfrey v. Georgia, 100 S. Ct. 1759 (1980)	1, 2, 3
Gregg v. Georgia, 428 U.S. 153 (1976)	2
Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980)	4
Holton v. State, 243 Ga. 312, 253 S.E.2d 736, cert. denied, 444 U.S. 925 (1979)	3
Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980)	6, 7
Stromberg v. California, 283 U.S. 359 (1931)	6
Statutes:	
Ga. Code Ann. § 27-2534.1(b)(7)	2, 3, 4
Rule:	
Rules of the United States Supreme Court, Rule 17	7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5856

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of the State of Georgia

REPLY BRIEF FOR PETITIONER

I.

This Court reaffirmed in Godfrey v. Georgia, 100 S. Ct. 1759, 1764 (1980), that if a state means to authorize capital punishment it has a constitutional responsibility "to define the crimes for which death may be the sentence in a way that obviates standardless [sentencing] discretion," and, if the jury is the sentencing authority, to provide it with clear and objective standards to channel the exercise of its discretion. The Court held that Georgia had failed in this constitutional obligation in allowing a jury to sentence a man to death on the basis of only the broad

and vague terms of its statutory catchall aggravating circumstance, Ga. Code Ann. § 27-2534.1(b)(7). The Court said that "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." Id. at 1765. The message of Godfrey is clear: the bare words of the catchall aggravating circumstance do not satisfy the constitutional obligation to channel the jury's discretion and therefore, if the jury has been charged only in the bare words of the statute, a resulting death sentence is unconstitutional.

When Godfrey is applied to this case petitioner's death sentence must be set aside. The defect in the process by which the death penalty was imposed on Godfrey -- and on petitioner -- is not, however, a mere error in jury instructions, as the State attempts to characterize our argument here.[1/] (Br. in Opp. 9-12.) The defect is the use of vague statutory words, undefined and unexplained for the benefit of the sentencer, as the sentencer's only means of distinguishing the crime that may merit capital punishment from

---

1/ There is no merit to the State's argument that the petitioner has not previously objected to the State's failure to apprise the jury of any narrowing construction of the catchall aggravating circumstance. Quite apart from the fact that the necessity of a narrowing jury instruction is part of the broader issue of the breadth of the catchall aggravating circumstance, the jury instruction issue was squarely posed when this Court directed the Georgia Supreme Court to reconsider its judgment in the light of Godfrey. In his memorandum requesting the opportunity to argue to the Georgia court concerning the meaning of Godfrey, petitioner specifically addressed the jury instruction question (see Pet. App. 13a-14a), and if the Georgia Supreme Court had not denied petitioner an opportunity to be heard, the issue could have been fully briefed.

the crime that does not. It is conceivable that, carefully explained and defined, even the words of the Georgia catchall aggravating circumstance could be rescued from their vagueness. The prospect of such a rescue moved this Court in Gregg v. Georgia, 428 U.S. 153, 201 (1976), to decline to rule the Georgia catchall aggravating circumstance unconstitutional on its face. There was not even an attempt at a rescue here, any more than in Godfrey's case. That is the importance of the jury instructions: the absence of meaningful jury instructions deprives the State of one possible basis for sustaining the death penalty.[2/]

The State, however, says that this case is different from Godfrey in that there the jury found only the first clause of the catchall aggravating circumstance -- "outrageously or wantonly vile, horrible and inhuman" -- whereas here the jury tacked on the qualifying phrase "in that it involved torture to the victim or depravity of mind on the part of the defendant." (Br. in Opp. 6.) That is not a distinction that makes the death penalty constitutional in this case when it was unconstitutional in Godfrey. The Georgia Supreme Court itself has recognized that the "depravity of mind" phrase by itself would "allow the death penalty to be imposed at random in any murder case." Holton v. State, 243 Ga. 312, 253 S.E.2d 736, 740, cert. denied, 444 U.S. 925 (1979). And, as petitioner has pointed out, because "torture" and "depravity

---

2/ The State argues that "there is no statutory provision under Georgia law which requires that the specific terminology under § (b)(7) be explained." (Br. in Opp. 12.) Perhaps not. But the Eighth Amendment to the United States Constitution does require that statutory aggravating circumstances be reasonably clear and objective on their face or be defined to jurors in clear and objective terms. Godfrey, 100 S. Ct. at 1764-65.

of mind" are phrased in the disjunctive in the statute and were so phrased in the jury's finding, the jury logically need have found no more than "depravity of mind" and the other elements held insufficient in Godfrey.[3/]

The jury was not told a word about what "depravity of mind" must entail. Moreover, on the facts -- no substantial evidence of torture and no finding of an aggravated battery -- there was no such "depravity of mind" as this Court understands is contemplated by Georgia law. In the Godfrey plurality opinion the Justices said that one of three "separate but consistent conclusions respecting the § (b)(7) aggravating circumstance" that could be discerned from the Georgia cases was that "the phrase, 'depravity of mind,' comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim." 100 S. Ct. at 1766. Now, that view of depravity may have been broadened in Hance v. State, 245 Ga. 856, 862, 268 S.E.2d 339, 346 (1980), and in the remand opinion in this case (Pet. App. 8a). The application to petitioner of a broader view of what constitutes depravity than prevailed at the time of his trial raises a serious question. (Pet. 24-25.) Moreover, neither view was brought home to the jury that sentenced petitioner -- or even suggested to it. Appellate definitions by themselves cannot assist in channeling jury discretion See 100 S. Ct. at 1769 (Marshall, J., concurring).

3/ This is apart from the fact that there was little or no evidence of torture as that term is commonly understood. As urged in the petition, a single isolated comment in the confused and inaccurate "statement" of petitioner, which is what the State relies on to support its theory of torture (Br. in Opp. 6), cannot constitutionally overcome the evidence of the State's own witnesses that the victim was unconscious after the initial blow and therefore could not have been tortured.

The State urges here that the Georgia Supreme Court's wooden attempt to find technical factual distinctions between this case and Godfrey somehow satisfies its constitutional responsibility to keep the catchall aggravating circumstance within constitutional bounds. But Godfrey tells us that relevant mitigating circumstances must be considered in determining whether a finding of "depravity of mind" is constitutionally permissible. Although the State argues that some of the factors that persuaded this Court that Godfrey's death sentence could not constitutionally be based on section (b)(7) of the Georgia statute are not present here, the State does not advert at all to the factors that make this an a fortiori case as compared with Godfrey. For example, petitioner was a teenager at the time of the murder and Godfrey was significantly older. Petitioner was severely intoxicated at the time of the murder and Godfrey was not. Petitioner killed only one person but Godfrey killed two. Petitioner's victim never anticipated the prospect of death, but one of Godfrey's victims clearly did. The State has ignored the facts that militate against the death penalty, and it has failed therefore to honor its solemn constitutional duty to avoid the arbitrary and capricious infliction of the death penalty.

II.

Petitioner asserts that the unconstitutionality of either of the two aggravating circumstances in this case requires the reversal of the death sentence. Thus, the death penalty is not saved by the fact that the jury also found that the murder of which petitioner was convicted was committed while petitioner was engaged in armed robbery,

which may be a valid aggravating circumstance (but see Pet. 13 n.6, 16-17). The State argues that it is well settled in Georgia that, as long as the Georgia Supreme Court sustains a finding of one aggravating circumstance, then the death sentence is permissible. (Br. in Opp. 14.) It is significant that the State does not assert straightout that the Georgia Supreme Court, whose opinion on remand was devoted to justifying petitioner's death sentence on the basis of the catchall aggravating circumstance, affirmed petitioner's death sentence by reference to this "clear" rule of Georgia law. As pointed out in the petition, the opinion is at best ambiguous, and petitioner, facing death, is entitled at the very least to a remand to resolve the ambiguity. (Pet. 16-17 & n.8). More fundamentally, a rule of Georgia law, however clear, cannot prevail over the United States Constitution.

The Court of Appeals for the Fifth Circuit has lately ruled that the death penalty cannot be constitutionally imposed if one of three (not just two) aggravating circumstances found by a Georgia jury is later held unconstitutional. The case is Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), a habeas corpus case. The court stated the question as follows:

> "The question presented, then, is whether the death penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty." Id. at 406.

In stating its affirmative answer, the court first cited Stromberg v. California, 283 U.S. 359, 367 (1931), for the proposition that "if the jury has been instructed to

consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside." 631 F.2d at 406. It went on to say that "[t]his settled principle of law applies with particular force in cases in which the death penalty has been imposed," citing Furman v. Georgia, 408 U.S. 238 (1972), which the court said had held "that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner." 631 F.2d at 406. The court concluded:

> "It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground." Id.

We recognize that Justices of this Court have expressed differing views on the applicability of the common sense rule of Stromberg to sentencing decisions, as opposed to convictions. (See Pet. 17-18.) This case is an appropriate vehicle for resolving those differences. Indeed, under the new Rule 17.1(b), a grant of the writ is called for by the conflict between the position the Georgia Supreme Court has taken on the significance of the invalidity of one of two or more grounds for imposing the death penalty and the squarely

contrary position of the Court of Appeals in Stephens v. Zant. "[A] state court of last resort has decided a federal question in a way in conflict with the decision . . . of a federal court of appeals."

CONCLUSION

For the reasons stated in the petition and in this reply, a writ of certiorari should be granted to review the judgment of the Georgia Supreme Court.

Respectfully submitted,

WILLIAM H. ALLEN
JOHN J. DONOHUE

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

February 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-5856

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

CERTIFICATE OF SERVICE

I, William H. Allen, a member of the Bar of this Court and one of the attorneys for the petitioner in this case, hereby certify that I have this 2nd day of February, 1981, served the accompanying reply brief for petitioner on the respondent State of Georgia by causing copies thereof to be mailed, properly addressed and with first-class postage prepaid, to Nicholas G. Dumich, Esq., Assistant Attorney General of Georgia, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334.

William H. Allen